IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

JOE ANDREW SALAZAR	)(	
	)(	CIVIL ACTION NO.
	)(	2:20-CV-004-JRG
VS.	)(	MARSHALL, TEXAS
	)(	
AT&T MOBILITY LLC, ET AL.	)(	JULY 24, 2020
	)(	9:02 A.M.

CLAIM CONSTRUCTION HEARING

BY VIDEOCONFERENCE

BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP

UNITED STATES CHIEF DISTRICT JUDGE

FOR THE PLAINTIFF:
Mr. Dariush Keyhani
Ms. Frances H. Stephenson
KEYHANI LLC
1050 30th Street Northwest
Washington, DC 20007

COURT REPORTER:
Ms. Shelly Holmes, CSR, TCRR
Official Reporter
United States District Court
Eastern District of Texas
Marshall Division
100 E. Houston Street
Marshall, Texas 75670
(903) 923-7464

(Proceedings recorded by mechanical stenography, transcript produced on a CAT system.)

FOR THE PLAINTIFF:	Mr. Geoffrey P. Culbertson PATTON TIDWELL & CULBERTSON, LLP 2800 Texas Boulevard Texarkana, Texas 75503
FOR THE DEFENDANTS:	Mr. Todd E. Landis WILLIAMS SIMONS & LANDIS, PLLC 2633 McKinney Avenue Suite 130 #366 Dallas, Texas 75204
	Mr. John Wittenzellner WILLIAMS SIMONS & LANDIS, PLLC 1735 Market Street Suite A #453 Philadelphia, Pennsylvania 19103
	Mr. Fred I. Williams WILLIAMS SIMONS & LANDIS, PLLC 327 Congress Avenue Suite 490 Austin, Texas 78701
	Mr. Gil Gillam GILLAM & SMITH, LLP 303 South Washington Avenue Marshall, Texas 75670

I N D E X

July 24, 2020

09:02:26 THE COURT: Good morning, counsel. This is Judge
09:03:05 Gilstrap. This is the time set for claim construction in
09:03:10 the Salazar versus AT&T, et al., matter. This is Civil
09:03:14 Case No. 2:20-CV-004.
09:03:18 Let me ask for announcements at this time.
09:03:20 What says the Plaintiff, Salazar?
09:03:23 MR. CULBERTSON: Good morning, Your Honor. Geoff
09:03:27 Culbertson for the Plaintiff. With me this morning is
09:03:30 Dariush Keyhani. Mr. Keyhani will be handling the
09:03:34 argument. And observing is Ms. Frances Stephenson. And
09:03:37 the Plaintiff is ready.
09:03:38 THE COURT: Do you have any other individuals on
09:03:40 the line either way, Mr. Culbertson?
09:03:43 MR. CULBERTSON: No, just those I announced.
09:03:46 THE COURT: All right. Thank you.
09:03:47 What's the announcement from Defendants?
09:03:50 MR. GILLAM: Good morning, Your Honor. Gil
09:03:51 Gillam, Fred Williams, Todd Landis, and John Wittenzellner
09:03:56 for the Defendants as well as the intervenor. We do have a
09:04:00 few other people that are observing today. We provided
09:04:02 those names to the Court.
09:04:03 But, importantly, client representatives for HTC
09:04:07 are with us, Mr. Vince Lam and Mr. David Wiggins. And
09:04:13 we're prepared to go ahead, Your Honor. We're ready.
09:04:16 THE COURT: All right. Thank you.

All right. Counsel, the Court's advised you previously of the order in which the Court intends to take up the disputed terms for claim construction today.

We'll do this -- we'll do this on a claim-by-claim basis, and we'll begin with "a microprocessor for generating a plurality of control signals used to operate said system, said microprocessor creating a plurality of reprogrammable communication protocols" from Claims 1 and 34 of the '467 patent.

Let me hear Plaintiff on this disputed term first.

MR. KEYHANI: Good morning, Your Honor.

Plaintiff's position, as we set out in our briefing, is that we -- we agree with the Court's prior construction in the prior case.

The -- it appears from the arguments raised by the Defendants that the two terms are mainly in dispute, and -- and with respect to this -- you know, two terms within this larger phrase or term. One is generating, and the other is plurality are particular -- are in -- are particularly in dispute.

With respect to generating, Defendants have argued that, you know, generating is bringing to existence from presumably thin air.

We, of course, dispute that construction. And in line with the Court's prior construction and in the context

which is based on the -- the specification and claims, interpret generating to not to bring into existence, but it's -- it's creating commands or -- or generating what -- whatever else the claim calls for to communicate with a -- you know, a plurality of external devices.

And those devices already exist. They've already been manufactured. They're already particular commands and communication protocols associated with those manufactured devices. And the device is simply communicating with those and generating commands for devices that -- you know, it -- it may not have been exposed before but it -- it communicates -- it has a learning functionality. And, you know, to be able to -- to communicate -- to create the commands that are associated with those existing manufactured devices.

So that's an issue. Generating is not creating -- it's not bringing in from -- bringing into existence, but rather, you know, finding what's already out there and -- and communicating what's already been created by the manufacturers of the devices.

In our reply -- in Plaintiff's reply, for example, on Page 3, we cited the specification, for example, and we point out -- you know, we take an excerpt from the specification -- Column 7, for example, Lines 40 through -- Lines 40 through 54 -- where the specification speaks to,

for example -- I would just take the last sentence, for example, of the -- of the excerpt that we -- we cited to.

In the alternative, comma, Manufacturer A employed different command codes for its own various models of TV sets. Another line: This command code set may have a different set of signals than other command code sets -- command code set employed for a TV set made by Manufacturer B.

And, basically the specification speaks to various devices that are already out there, and the -- the -- the communication command control testing system at issue is communicating with those devices.

And -- but those -- those devices and the commands necessary to communicate with those devices -- the protocols, the commands are already in existence. They're not created from scratch. Otherwise, it would defeat the purpose. There'd be no purpose for the device -- the communication command control and sensing system to create commands that are not useful for communicating with something that exists. There's no purpose for that.

On the term "plurality" that is in dispute, in the context of the specification -- as the Court noted in the prior case, Salazar versus HTC, in -- in a summary judgment opinion, you know, the whole purpose of this patent, the claims and the invention is to communicate with a -- with

different external devices.

We cite to the -- you know, the reference that in our briefing -- and that purpose of communicating with -- with different external devices, which is also captured in the preamble of the claim, which talks to -- speaks to communication with a communication command control and sensing system.

And I'll just read the -- the preamble so I don't misquote it. The preamble of Claim 1, for example, states: A communication command control and sensing system for communicating with a plurality of external devices comprising, colon.

And the plurality here, as we've argued in the briefing, and I'm not going to recite the various parts of the briefing -- of the patent and -- and regurgitate all of that, but the purpose is to communicate with a plurality.

And plurality, as the Court noted before and as the specification makes, you know, very clear, is really about a variety -- various different -- you know, different devices.

It's not a quantitative limitation, two or three or any particular number. It's the plurality used in the context of the specification, which we submit should be read -- should be read from -- from the perspective of one of ordinary skill in the art in the context of the

specification -- really is about a reference to a variety, different external devices.

But not a specific number because the whole idea is to be able to communicate with as many external devices that are out there or available. And it's not -- you know, it's not a particular number.

And, you know, we -- in our briefing we responded to arguments raised regarding cases that were, you know, referenced by Defendants, Dayco and Versa Corp., and those cases ultimately held that in -- in their particular context, of course, you know, that -- that plurality meant one or many. And no particular number ultimately defines plurality in the context of those inventions that were the subject of Dayco, for example.

And we submit that that's the same here in the context of the specification, that -- that the term "plural" or the concept of plural, for example, in Dayco and in Versa was construed or interpreted to mean to describe a universe ranging from one to some higher number, rather than requiring more than one item. But a universe ranging from one to some higher number.

And we don't believe construction is necessary because we think that's the plain and ordinary meaning -- or the plain and ordinary meaning rather is understood by one of skill in the art.

But to the extent, you know, parties cite to these cases to try to extract some construction, even in those cases and in those context, it was -- it was meant -- what we think it meant -- you know, would mean to one of ordinary skill in the art in this context.

But, again, we believe the plain and ordinary meaning of the term or ordinary and customary meaning of the term controls. No construction is necessary for the term "plurality." There's a plethora or plurality --

THE COURT: Let me stop you, counsel. Somebody is adding on or dropping off. And every time they make a move, we get a sound on this end that covers up your speech, and it's hard to follow your argument.

I'm going to ask everybody again, as my law clerk reminded you before we started, I expect everybody on this videoconference to stay on this videoconference. I don't want people dropping off or adding on, because as I've said, that creates an audio interference that makes it hard to follow counsels' arguments.

So if you're here, stay here. If you're not on this conference, don't join in. We'll go with the people we have. But let's keep it -- let's keep it static and not add or subtract as we go forward.

Okay. Mr. Keyhani, please continue.

MR. GILLAM: Excuse me, Your Honor. It was my --

it was my fault. My call simply dropped, Your Honor. If you would prefer me not to call back in, I will not do so. I didn't drop myself. It just went out. But it was my call that dropped.

THE COURT: Well, I can see you and hear you, Mr. Gillam. Is there a need for you to do something else, or are there other people through your call that are listening in?

MR. GILLAM: No --

THE COURT: Why would -- why would you need to call back in.

MR. GILLAM: Well, my screen went black, and all I could see was me. And I lost everybody else is what I'm saying. Obviously, some technical glitch on my end is what I'm saying.

THE COURT: All right. And are you in that posture now, or have you returned to full participation?

MR. GILLAM: I'm -- I'm back and I can see everybody and hear everybody again.

THE COURT: Okay. Well, that's certainly something unavoidable. Hopefully that won't repeat itself. I assume it were -- it was generated by people adding or leaving the conference. But with that explanation and with my reminder to everybody else, we'll just go forward from here.

09:15:40 All right. Let's go back --

09:15:42 MR. GILLAM: Would you like -- if it does happen again, Your Honor, would you like me not to call back in, not to interrupt? I mean, I would like to participate in the hearing obviously, but I do not want to interrupt the Court.

09:15:52 THE COURT: No. If it happens again, obviously, you're -- have appeared in the case and are active, you need to call back in. If it does, though, please tell me that's what this is caused by so I'll not assume, as I did earlier, it's somebody else I can't see.

09:16:10 MR. GILLAM: Understood. Thank you, Your Honor.

09:16:11 THE COURT: Mr. Keyhani, before you continue, let me ask you a question. Are you contending that this -- and I'm talking now back on the generating and creating limitation.

09:16:23 Are you contending that this limitation encompasses a microprocessor configured to generate or to create only a single control protocol.

09:16:42 MR. KEYHANI: No, Your Honor. But rather a -- a microprocessor for generating. In other words, the -- the claim term speaks to a microprocessor that is capable -- this is a capability claim. There's case law on -- on the language and the context of this. And we argue that this is clearly a capability term -- term.

09:17:06 And it's -- so it's a microprocessor that's
09:17:09 capable of generating -- plurality means multiple, but,
09:17:16 again, not -- not any particular quantity. Because it's --
09:17:20 because it's a capability claim, Your Honor, it's not a
09:17:22 reference to any specific number of protocols. And we
09:17:25 get -- and if we step back and I understand -- as I was
09:17:29 explaining a moment ago, the context of the invention is --
09:17:34 is that you're -- you have a device, a communication
09:17:41 command control and sensing system, which is some kind of a
09:17:44 smart system, if I may, that is capable of communicating
09:17:49 with any device that it -- it comes in contact with.
09:17:51 It can learn parameter sets, and then it can recreate
09:17:55 commands, any set of commands. It can -- it can -- it
09:17:58 can -- so it's -- so it's not a single -- to answer your
09:18:02 question, Your Honor, as directly as I can, it's not a
09:18:05 single protocol or a single communication protocol or
09:18:09 signal -- control signal rather, but it is a plurality
09:18:14 which is one or as many necessary.
09:18:16 And really, because it's a capability claim, it's
09:18:18 about -- it's really the microprocessor's capability to do
09:18:22 this. So it's not -- and it doesn't speak to one or two --
09:18:28 as many that is necessary or would be -- be used in
09:18:30 connection with communicating with an external device, Your
09:18:33 Honor.
09:18:33 THE COURT: All right.

MR. KEYHANI: I hope that answers your question.

THE COURT: Please continue with your argument.

MR. KEYHANI: So, yes, Your Honor, I don't -- I think I will wait now. I -- I think I've said enough at this point, and I will wait for the Defendants to raise their arguments. And then if I have some additional rebuttal or commentary, then I'll raise it at that point, Your Honor.

And in sum, we -- we do think that the Court's construction in the prior case was fair and reasonable. And one of ordinary skill in the art -- construction and/or deferring to plain and ordinary meaning. The Court did not construe the term "plurality" in the prior case specifically. And we don't think it needs construction in this case.

The plain and ordinary meaning of -- of plurality is sufficient. It's understood by one of ordinary skill in the art in the context of -- in the context of the specification.

Thank you, Your Honor.

THE COURT: Let me hear from Defendants, please.

MR. LANDIS: Good morning, Your Honor. Todd Landis on behalf of Defendants and intervenors.

THE COURT: Good morning, Mr. Landis.

MR. LANDIS: Your Honor -- good morning.

09:19:39 Your Honor, Mr. Keyhani addressed two terms for
09:19:43 this first term in -- in the Court's order. The -- the
09:19:47 term in the Court's order was really just to address
09:19:51 plurality.
09:19:52 He also addressed generating, which I noticed on the
09:19:56 Court's listing of terms would come towards the end of the
09:19:56 time this morning. Would you like me to address both of
09:19:59 those now?
09:20:01 THE COURT: I would, yes.
09:20:03 MR. LANDIS: Thank you, Your Honor.
09:20:03 Your Honor, I would like to start -- I think you
09:20:05 have our slide deck that we gave to the Court last night.
09:20:10 THE COURT: I do.
09:20:10 MR. LANDIS: Thank you, Your Honor.
09:20:11 I'd like to start at Slide 5 and address plurality
09:20:14 first, and then I'll address generating.
09:20:16 Slide 5 -- the claim terms -- there are really two
09:20:22 claim terms, and there are actually multiple claim terms in
09:20:25 this claim, Claims 1 and 34, that use the word "plurality."
09:20:29 We move to Slide 6. The real question here is,
09:20:33 is -- does plurality mean two or more?
09:20:37 The -- the Plaintiff would like to argue that
09:20:39 plurality means variety but has presented no evidence
09:20:44 and -- and nothing from the intrinsic record which would
09:20:47 show that we should move away from what plurality's plain

and ordinary meaning is, or the meaning that has been attributed to it in patent law for, I would venture, close to 40 years, which is two or more.

If I could have the Court skip ahead to Slide 8 with me.

The Federal Circuit and the Court have both held on numerous occasions that plurality means two or more. It doesn't mean less than two.

The Federal Circuit in Apple v. Samsung said: Under the Court's case law, the term "plurality" means at least two, or simply the state of being plural. It doesn't mean less than two, and it doesn't mean variety.

There is nothing in these claims, nothing in the specification, which would cause the word "plurality" to have any meaning other than what the Federal Circuit has attributed to it for many, many years and many, many cases.

I heard Mr. Keyhani talk about Dayco. I believe Dayco stands for the same proposition, that plurality means two or more. The August Tech. case is the same way.

Your Honor in BMC Software also found that plurality means more than one.

I was hard-pressed to find any Court that found that plurality meant anything other than more than one or two or more.

If we look at Slide 9, the one case that Plaintiff

09:22:29 cites to the Court is Versa Corp. But that citation is
09:22:34 misplaced. First, the claims in Versa Corp. didn't use the
09:22:38 word "plurality." The word "plurality" doesn't appear in
09:22:43 the claims. Plurality appeared in the specification of a
09:22:48 patent in Versa Corp.
09:22:49 The real issue in Versa Corp. was does the plural
09:22:54 word "channels" have to mean two or more channels? And in
09:23:00 Versa Corp., the Federal Circuit said, no. Just using the
09:23:05 plural word "channels" doesn't mean it has to be two or
09:23:09 more because the specification says you can have a
09:23:11 plurality of flutes, and channels occur between flutes. So
09:23:18 if you only had two flutes, you could have one channel.
09:23:21 And, therefore, the plural -- the use of the plural word in
09:23:25 the claims doesn't necessarily mean two or more.
09:23:27 That is not the situation we have here.
09:23:36 If we move to Slide 10, Your Honor.
09:23:38 The Plaintiff here, Mr. Salazar, had an
09:23:41 opportunity to claim his claims any way he wanted. He did
09:23:44 not simply use the plural of words. He used plurality,
09:23:49 plurality of external devices, not external devices.
09:23:52 Plurality of control signals, not simply control signals.
09:23:59 And we can see the rest of the list.
09:24:01 Using the word "plurality" in patent law has a
09:24:04 special meaning. It means two or more.
09:24:07 The Federal Circuit, almost all District Courts

that I could look up and find have all agreed that plurality means two or more. And that should be the meaning attributed to it.

And, Your Honor, we have no problem with the Court's previous construction of these terms in the general sense. But given the last case, we anticipated that this argument would happen about plurality. And that's why we brought this issue to the Court's attention because we think this is a well-settled issue that plurality means two or more.

I'll move on to generating, unless Your Honor has any questions.

THE COURT: That's fine. Please do.

MR. KEYHANI: I'm sorry, Your Honor. This is Dariush Keyhani. I apologize for interrupting. We never received a copy of any of these slides that Defendants' counsel is referencing at any time.

MR. LANDIS: Your Honor, I just sent the slides to Mr. Keyhani. That was just an oversight. We had planned on sending it to him before the hearing, and it just got mixed up in the works, but he now should have them all.

THE COURT: Well, that's fine, Mr. Landis. But I'm not going to hold Mr. Keyhani or any counsel to receiving slides in the middle of a hearing and then having to respond directly to them.

09:25:26 If you want to argue from your slides, if you want to
09:25:28 cite cases you've -- you've listed, that's fine. But
09:25:32 without him having the benefit or any opposing counsel
09:25:34 having the benefit for them longer than in the middle of a
09:25:38 hearing, we're not going to use them as a structured part
09:25:41 of your argument.
09:25:42 I would -- I would certainly --
09:25:44 MR. LANDIS: Understood, Your Honor.
09:25:44 THE COURT: -- I would certainly do the same if
09:25:46 they had been sent to you in the middle of the hearing, as
09:25:48 well.
09:25:49 Let's go forward on that basis.
09:25:51 MR. KEYHANI: Thank you, Your Honor.
09:25:59 MR. LANDIS: Your Honor, with respect to
09:26:00 generate -- and the terms that we really had listed here in
09:26:05 the argument were "creating," "create," "generate" --
09:26:08 "generating," "generated," and "generate." They all appear
09:26:13 in the claims in one form or another.
09:26:14 The question is: Does it mean bring into
09:26:17 existence? And I think the heart of the argument here is
09:26:19 really what is this invention about?
09:26:23 Mr. Keyhani has represented to the Court that this
09:26:26 invention is about using some sort of protocols or some
09:26:30 sort of -- of -- of schemes that manufacturers have come up
09:26:36 with in order to communicate with their devices, that this

device uses those schemes. But that is not at all what this patent is about.

In Column 7 of the patent, starting at Line 14, the patent states: Open architecture software within the microprocessor 30 creates a generalized command and control protocol which makes it possible to interact in a wireless mode with any number of external devices that have compatible transceivers with wireless communication command control and sensing handset 10.

The invention of this patent was not to use what the manufacturers gave to the device. It was to take those things and transform them into a new generalized command and control protocol. It was to create and generate new protocols and new control signals.

The reason that the device had to do that, which is set forth at the bottom of Column 7, starting at Line 55, and it goes to the top of Column 8, Line 16, is because memory space was severely limited at this time.

As the patent says, it was on the order of 10 kilobytes. And Your Honor might remember from the trial, this was a big point of contention during the trial.

The reason that this device needs to create its own protocol, its own command and control protocol is because it didn't have the practical ability to store all of the protocols and formats and rules from each

manufacturer. It wanted to be able to communicate with all the devices, so it needed to come up with a new way to do that. And it did it by creating, bringing into existence a new protocol.

THE COURT: Are you -- are you --

MR. LANDIS: That is what this patent is about.

THE COURT: -- are you telling me, Mr. Landis, that this -- this patent requires the base station to create some new signal or protocol out of just thin air without reference to anything because there was not enough space to store the existing communication protocols and signals? So, now, it's just got to come up with it out of thin air? Is that what you're telling me? Where -- where it would come up with it if it's generating it or creating it and bringing it into existence, as you say, for the first time?

MR. LANDIS: Yes, Your Honor. It's not creating it out of thin air. That's -- that's not what I'm saying to the Court.

What it's doing is, it's taking all of the information it's getting from the various manufacturers, and it's using that information to create a new scheme, a new command and control protocol that can be utilized with each of the devices, because it couldn't take what it got -- the amount of information it got, the command sets -- and if you look

09:29:59 in Column 8, probably around -- starting at Line 11, it
09:30:04 talks about how big this information was and the fact that
09:30:07 this device couldn't store it at this time.
09:30:09 And so it needed to take those pieces and then
09:30:13 create a new command and control protocol from that. That
09:30:17 command and control protocol is still -- wasn't in
09:30:20 existence beforehand. It is being made using pieces of
09:30:24 information that were in existence, but the thing that's
09:30:28 being created is new.
09:30:34 THE COURT: So you're telling me if the device
09:30:37 communicates with the -- I'll call them appliances, be it
09:30:43 television or sound system or something else, if the base
09:30:48 station communicates with these appliances by using an
09:30:53 existing signal or protocol that came from the
09:30:58 manufacturer, then in your view, they don't meet this claim
09:31:00 whatsoever?
09:31:00 MR. LANDIS: Yes, Your Honor, that's my view, they
09:31:05 do not meet this claim.
09:31:06 THE COURT: Wasn't -- and correct me if I'm wrong,
09:31:09 Mr. Landis, but wasn't the process of compacting the
09:31:14 information part of the inventiveness of this patent, so
09:31:21 because there were so many devices and so many existing
09:31:24 signals or protocols out there, wasn't part of what made
09:31:29 this unique the ability to compact that information and use
09:31:32 those existing means of communication to interact with the

09:31:36 appliances?

09:31:38 That seems -- if that's true, that seems to be counter
09:31:41 to your argument that the device has to create something
09:31:45 new because they couldn't store all the pre-existing
09:31:50 communication protocols.

09:31:52 MR. LANDIS: Your Honor is correct, but with -- in
09:31:58 my opinion, with a slight modification.

09:32:00 Yes, compaction or compression to get down to use
09:32:04 the 10 kilobytes memory that was available at the time was
09:32:07 an important part of this invention. But to do that, they
09:32:12 had to generate and create this new command and control
09:32:17 protocol. That's the way they got to the compaction.
09:32:21 That's the way they were able to utilize the space they had
09:32:27 available.

09:32:28 They couldn't do it through straight compression
09:32:30 of the stuff they got. They had to find a new scheme,
09:32:34 which is delineated in this patent for column after column.

09:32:39 They had to find a new scheme in order to have that
09:32:43 information available. That new scheme allowed -- allowed
09:32:47 the compaction or the compression to occur such that the
09:32:50 memory space available was sufficient.

09:32:53 THE COURT: All right. I'm following your
09:32:55 argument. What else?

09:32:57 MR. LANDIS: That's all I have, Your Honor.

09:32:58 THE COURT: Mr. Keyhani, I'll give you a brief

rebuttal on this.

MR. KEYHANI: Thank you, Your Honor.

On the term "plurality," it's Plaintiff's position, and it was the case -- it was the position the parties took in the prior case and the Court took, the term "plurality" was never construed in the prior case.

We submit that the plain and ordinary meaning of the term "plurality" understood in the context of the specification by one of ordinary skill in the art is -- is sufficient.

There's no support for narrowing or redefining a term if the term itself is -- is clear or reasonably clear to one of ordinary skill in the art.

THE COURT: What is --

MR. KEYHANI: When we speak about -- yes?

THE COURT: What is your understanding of what a person of ordinary skill in the art would consider or know plurality to mean?

MR. KEYHANI: In the context of the specification, Your Honor, I -- I'll take a quote from this Court in the prior case when -- when this Court in -- in its opinion on summary judgment defined the object of the invention, which -- the very object of the invention is to facilitate communication with different third-party external devices.

So different various -- that's the meaning in the

context -- that's the ordinary meaning. We don't need to change it. We don't need to change the word "plurality" to anything because plurality in this context means a variety. It means different.

And if you -- if we were to interpose Mr. Landis's definition or re -- or construct the term "plurality," then it would be to facilitate -- then -- then the preamble would have to be reinterpreted of this -- of the claim, would be to communicate with two or more -- with two or more third-party external devices or whatever number Mr. Landis is arguing, but it could be one device.

It's the capability of a microprocessor, because this is -- this is a claim that speaks to the capability. A microprocessor for generating. It doesn't say that the microprocessor is generating. A microprocessor for generating a plurality of communication protocols. And the preamble, Your Honor, as I mentioned earlier -- and -- and we can look at any number of references in the specification, but the claim language is very instructive and provides guidance.

A communication -- I'm reading the preamble of Claim 1. A communication command control and sensing system for communicating with a plurality of external devices.

And this Court, which is consistent with the plain

and ordinary meaning of the invention, stated: The purpose of this invention is, quote, to facilitate communication with different third-party external devices.

So implicitly, Your Honor, we submit that the Court, you know, already sort of, you know, understood the -- or referenced the -- the purpose of the -- of the invention and also uses the word different. And we think that word different third-party external devices, if you were -- if you were to change the word in the preamble to different, communicating with different external devices, you would capture the very essence of this patent.

The ability, the capability, Your Honor, for a microprocessor to communicate would -- with different or variety -- with different external devices, it -- there is no indication in the specification whatsoever anywhere that there's any quantification.

Other cases and interpretation of language in other cases are not relevant to the construction of a term or understanding of a term within a patent where the specification -- the intrinsic evidence makes crystal clear that that is the purpose of the invention -- --

THE COURT: Let me --

MR. KEYHANI: -- and it would frustrate the purpose to change the term.

THE COURT: -- let me stop and ask you a question.

09:37:21 Isn't it the case that in the claim construction opinion
09:37:24 entered in the earlier case, the HTC case, that plurality
09:37:26 was noted to be two or more? Are you now telling me that
09:37:29 as much as you want to embrace the prior opinion on
09:37:32 generating and processing -- excuse me, generating and
09:37:35 creating, you don't want to embrace it on plurality?
09:37:37 MR. KEYHANI: Your Honor, I -- we -- we do.
09:37:42 I'm -- I'm not familiar -- that's not my understanding. I
09:37:45 apologize, Your Honor. I did not -- I did not read that
09:37:48 out of the -- out of the prior construction, Your Honor.
09:37:50 THE COURT: I -- I would refer you to the
09:37:52 construction in the prior opinion relating to plurality of
09:37:57 home entertainment systems, Claim 26.
09:38:00 MR. KEYHANI: I'm going to take a look at that,
09:38:03 Your Honor.
09:38:03 THE COURT: I may be wrong, but -- it's been
09:38:05 awhile, but that's my recollection.
09:38:12 Try Page 54 of the claim construction opinion in
09:38:15 the earlier case.
09:38:16 MR. KEYHANI: Thank you, Your Honor. On Page 54,
09:38:41 after the reference to the excerpt that the Court
09:38:46 references, it states: The specification -- I'm reading
09:38:48 off of the -- the first sentence after the -- the quoted
09:38:54 language of the specification on Page 54 of the opinion.
09:38:58 The specification mentions various devices that

may be part of the home entertainment system. The '967 patent provides no special needs to determine home entertainment system. The Court here uses the term "various devices," and we agree with that, Your Honor. The specification mentions various devices that may be part of the home entertainment system.

And so the reference to -- and the -- and earlier, on Page 53, Your Honor, it says: The specification -- this is at the bottom of Page 53 under -- under the heading The Specification, underlined.

The specification references a plurality of external devices that may be used in relation to describe the invention, for example -- and it goes on and cites to this excerpt, Your Honor, Column 20, Lines 41 through 22.

THE COURT: Let me -- let me stop you, Mr. Keyhani. I'll -- I'll be more precise in my direction.

Page 54 of the prior claim construction opinion under the Section that says Conclusion, the second paragraph --

MR. KEYHANI: Oh.

THE COURT: -- the fourth line down of the second paragraph says: On balance, the Court finds that the plurality, parentheses, i.e., two or more, close parentheses, of home entertainment systems are separate from the previous claimed base station and handset. That's

the sentence I'm referring to.

MR. KEYHANI: Yes, Your Honor. We -- I see that, and I -- I did not read that, Your Honor -- the, i.e., and the parentheses as a specific construction of the Court. I read the description, the Court describing the -- what I just read above, referencing various -- the specification mentions various devices.

Your Honor, I would submit -- we would submit that in the abstract, if I may, or in -- you know, in maybe common lingo, the term "plurality" might mean two or more. But in this specific context, if you really read the specification, as the Court describes it above, it says: The specification mentions various devices. And this is discussing -- you know, I'm not going to argue what the Court meant.

THE COURT: No.

MR. KEYHANI: But -- so I apologize if I -- if it sounds like -- we're not trying to do that. It just -- the Court's sort of intuitive interpretation -- and this was also with the input of the Court's presumably technical expert or consultation, is consistent with our reading of that.

And so that's how we read it. And we think we're -- it's consistent with that, Your Honor, that it's -- that it really is about various -- it's really about -- and -- and

also, the Court's reference in the summary judgment opinion also talks about to facilitate -- the purpose of the invention is to facilitate communication with different third-party devices, various devices.

Now, keeping in mind, Your Honor --

THE COURT: You're going to have to --

MR. KEYHANI: -- various --

THE COURT: -- you're going to have to slow down if you're going to read like that.

MR. KEYHANI: I'm sorry. The term "various," Your Honor, and the term "different" does not -- is not inconsistent, Your Honor, with two or more. They could be two or more. But it's a -- it's a nuance, because the -- the -- the preamble states that this is a -- a microprocessor for generating.

So it's the capability to do this -- this -- whatever comes next, for generating. The Court has taken the position clearly, and we agree with that position, that it's about the capability to do -- the capability to do these various things, the capability to communicate with various devices.

Now, I guess the question is this. If we define it -- plurality as having to be two, let's just play that out for a moment. If we say plurality means two or more, what are we excluding? We're excluding one.

09:43:08 So would -- would Salazar -- would the invention
09:43:11 that communicates -- would a communication command control
09:43:16 and sensing system, Your Honor, that communicates with one
09:43:19 external device, would that not be within the plurality?
09:43:23 Does it have to communicate with -- does the patent --
09:43:26 does the invention really teach that it must communicate
09:43:29 with two or more, or is the term "plurality," which does
09:43:32 not need construction, Your Honor, really mean what the
09:43:34 Court in at least one section described it, as we
09:43:39 understand it, as the purpose of the invention articulated
09:43:41 by the Court itself is to facilitate communication with
09:43:46 different third-party external devices, which would -- we
09:43:50 submit is a nuance, but it is important because it
09:43:54 captures -- we're all trying to capture what the intent --
09:43:58 what one of ordinary skill in the art would understand is
09:44:02 the intent and to -- and -- and a disclosure, and it really
09:44:05 is about various -- it's about different. And those are
09:44:07 words that we find both in the Court's claim construction
09:44:11 language.
09:44:12 Again, the Court -- it's the Court's construction,
09:44:14 so I'm not going to put words in your -- or try to
09:44:17 interpret your mind, but that's how we see it as most
09:44:20 consistent. And we don't think it requires construction.
09:44:23 The experts during trial in the last case did not
09:44:25 have any problem, you know, interpreting -- if Your Honor

09:44:31 recalls, this claim, and many claims they use the word
09:44:36 "plurality," both experts -- both Plaintiff's and
09:44:37 Defendant's expert didn't seem to have any difficulty
09:44:40 understanding and applying that, Your Honor.
09:44:42 THE COURT: If it's capable of communicating with
09:44:45 only one appliance, how is that various? One is not
09:44:48 various.
09:44:51 MR. KEYHANI: Your Honor -- I'm sorry, but one or
09:44:53 more -- and they're not limited to one, Your Honor. Yes,
09:45:00 one is not various, Your Honor. That's -- that's correct.
09:45:04 All we're saying is it's one or more. Not limited
09:45:08 to -- it's not a quantification we're saying. It's a
09:45:11 plurality -- in the context means a variety, many, any --
09:45:15 any one of which, any one of which, different.
09:45:18 As the Court noted, the purpose of the invention
09:45:20 is to facilitate communication with different external
09:45:26 devices, various external devices, one or more external
09:45:29 devices, any number of external devices.
09:45:31 But it's not really about specifically limiting
09:45:33 the claim. It must communicate with this number of
09:45:35 devices. That was not the intent. I don't believe one of
09:45:38 ordinary skill in the art would understand it to limit it
09:45:42 to any particular -- nowhere in the specification can
09:45:46 Landis or -- you know, point out anywhere where it limits
09:45:49 the communication to external devices to any particular

09:45:52 number of devices.

09:45:54 It's simply, as the Court summarized before the conclusion, various -- the specification mentions various devices that may be part of the home entertainment system, and there was a reference to a plurality of devices.

09:46:07 And that's all I have, Your Honor.

09:46:11 THE COURT: All right. Please -- please be careful that you refer to opposing counsel as Mr. Landis, not just Landis.

09:46:19 MR. KEYHANI: I -- I apologize, Your Honor.

09:46:20 THE COURT: All right. Do you have anything for me very quickly on the generating or creating before we move on?

09:46:24 MR. KEYHANI: No, Your Honor. It's -- other than to say that -- I guess one point I do have -- just one point, that Your Honor is -- is correct and -- and -- and we agree that the -- the claim element that -- as Your -- as Your Honor described that involves compacting and com -- compressing, the compression concept of parameter sets to recreate command code sets, Your Honor, that really tells us that, in fact -- that is clear guidance that the notion here or the concept here, the invention here is about taking information, as Your Honor noted, and using that information, the parameter sets, compressing the parameter sets, or taking in the -- the parameters -- the parameter

09:47:18 sets and then recreating command codes.

09:47:21 But there is information to start with. It is not
09:47:24 from the thin air. And it is a finite -- it is a creation
09:47:27 from a finite universe of information. There's no question
09:47:31 about that.

09:47:31 It would be -- I -- I don't want to use this word.
09:47:35 It would be nonsensical to try -- for its device or not
09:47:40 possible -- as far as we know, it's certainly not disclosed
09:47:43 by Mr. Salazar, to create commands from the thin air.

09:47:46 What are you -- what are you -- what are you
09:47:48 creating commands for? You're creating commands for
09:47:52 specific devices that have specific demand -- commands.
09:47:56 That's what the commands are being created for. You're
09:47:58 taking parameters, information, and using that information
09:48:01 to recreate -- and the recreation is really the creation of
09:48:06 commands that can communicate.

09:48:07 But you're doing it by compression. So this
09:48:09 brings an efficiency and a memory-saving feature to the
09:48:14 device that, as Your Honor noted, is a key aspect of the
09:48:19 inventiveness, which the examiner also noted during the
09:48:21 prosecution.

09:48:22 So you're taking information and then using this
09:48:24 information to create the commands, but you're not starting
09:48:27 off with nothing, Your Honor. You're starting with
09:48:29 information.

09:48:29 THE COURT: I understand your argument.

09:48:30 MR. KEYHANI: Thank you, Your Honor.

09:48:30 THE COURT: All right. Let's move on to the next term for construction. This -- this emanates from Claim 2 of the patent-in-suit, "selector control by said microprocessor for enabling," et cetera.

09:48:48 Let me hear from -- let me hear from the Plaintiff first -- excuse me -- on this.

09:48:54 MR. KEYHANI: Is this the term "selector," Your Honor?

09:48:57 THE COURT: Yes, "selector controlled by."

09:49:01 MR. KEYHANI: Thank you, Your Honor.

09:49:09 THE COURT: I don't think you want me to read all of that language into the record. I think we all know what --

09:49:13 MR. KEYHANI: No, no -- yes -- yes, we do. Yes, Your Honor.

09:49:15 We don't -- the -- the Plaintiff's position is we -- we agree. We accept the Court's construction. We don't need to redefine, or I should say deference to the plain and ordinary meaning of this term.

09:49:31 The Defendant -- Defendants -- or Mr. Landis has -- argues that this should be defined as a multiplexer or a demultiplexer.

09:49:44 These terms do not appear in the specification

anywhere, and I'm not sure exactly what they mean. I have to look them up. But there's no reference whatsoever in the specification.

The selector is -- has a plain and ordinary meaning. It's a simpler term itself. It's the term that's used in the specification.

There are only two bases, Your Honor -- as Your Honor is aware, that justify departing from the, you know, plain and ordinary meaning. And one is if the patent owner or the patentee serves as a lexicographer, or the patent owner disavows the full scope of the claim, which that must be by clear and unmistakable surrender. There is no lexicography here. The patentee never tried to redefine the word "selector" anywhere in the -- in the specification. And there is no clear and unmistakable surrender of any construction or definition of selector.

So this just -- and quite frankly, Your Honor, aside from all of that, aside from the fact that there's no reason to change the term and it doesn't meet the two required tests, it would be more confusing I -- we believe for the jury anyway to try to use a term -- a more complicated term that's not even used by the specification.

So we don't think this is necessary. No construction is necessary. The Court's prior construction in the prior case -- or position, I should say -- I think

there was no construction -- should just stand, Your Honor.

THE COURT: All right. Let me hear from the Defendant.

MR. WITTENZELLNER: Good morning, Your Honor. John Wittenzellner for Defendants and intervenors. May it please the Court.

THE COURT: Please proceed.

MR. WITTENZELLNER: Thank you, Your Honor.

I'd like to start with Slide 13.

THE COURT: We're not going to use slides.

MR. WITTENZELLNER: Your Honor --

THE COURT: We're not going to use slides since the other side didn't get them before the hearing. Just -- just give me your argument.

MR. WITTENZELLNER: Okay, Your Honor. Will do.

One of the main objectives of this invention is to provide two full-way communication, whether it be via infra-red or radio frequency communication links. And this is -- one example of this is Column 1, Lines 34 through 36 of the patent.

And this allows a system to be able to use either type of communication, IR or RF, as a backup. So, for example, if the RF fails, the infra-red can be used in its place. And that comes from Column 1, Line 34 through 36, of the specification.

So with that objective in mind, as well as additional disclosures in the specification, we submit that it is clear that the selector is a multiplexer/demultiplexer.

Now, opposing counsel said that there's no reference in the specification to a multiplexer/demultiplexer. The term not used.

I agree that the term is not expressly used, but it's our position that when a person of ordinary skill in the art were to look at the specification, as well as Figure 3, that says multiplexer/demultiplexer to a skilled artisan.

THE COURT: Let me ask you this --

MR. WITTENZELLNER: Looking at --

THE COURT: -- let me ask you -- let me ask you this, counsel. Respond to the argument that this is a thinly-veiled attempt to import a limitation, that multiplexer/demultiplexer is not spelled out in the patent and it's a -- it's a clear narrowing of selector strictly for purposes of avoiding infringement. What -- what's your bottom-line argument to that?

MR. WITTENZELLNER: Sure, Your Honor.

Our bottom-line argument would be twofold. First, the -- Figure 3, as it's depicted and shown in the RF transceiver and IR transceiver connected two inputs to

09:53:36 be combined down to a single common path to the
09:53:38 microprocessor, and that's during reception or receiving,
09:53:41 and the same common path going back out during transmission
09:53:45 is a hallmark of a multiplexer/demultiplexer.
09:53:48 In addition, it's also consistent with the
09:54:00 objectives of the invention, the objective being that
09:54:03 ability to -- as Mr. Landis will discuss in further detail
09:54:05 later, for the microprocessor to use common communication
09:54:10 protocols, whether it's transmitting via RF or infra-red.
09:54:14 And, again, this falls back to one of the
09:54:17 objectives that I just discussed of being able to
09:54:22 communicate via either means and to fall back on one of
09:54:26 those methods of communication if the other should fail.
09:54:29 And so I think a person of ordinary skill in the
09:54:33 art looking at what the patent was trying to accomplish,
09:54:38 its ability to -- to share a common path out of the
09:54:40 processor, and then throughout that common path to either
09:54:46 the infra-red transceiver or the RF transceiver, combined
09:54:52 with Figure 3 which, as we described in our briefing,
09:54:55 clearly shows the RF/IR selector acting as a
09:54:59 multiplexer/demultiplexer, but that person of ordinary
09:55:00 skill in the art would look at this and say that's a
09:55:02 multiplexer/demultiplexer, even though the term itself, as
09:55:06 we admit, is not expressly used in the specification.
09:55:10 THE COURT: Let me ask this question. In these

competing constructions that the parties have proposed, there seems to be a variance between your use of the claim language as desired and the Plaintiff's suggestion as selected by a user. Is there a fight between the parties here on that difference, or is that a distinction without a difference?

MR. WITTENZELLNER: Your Honor, I believe that comes from the earlier recitation in Claim 1 about -- about the desired command code set. But that's not really the issue that we have a dispute over with respect to this term.

THE COURT: Okay.

MR. WITTENZELLNER: One other -- if -- if I may, Your Honor, one other thing that I meant to add is that nothing in the patent excludes the use of IR or infra-red or radio frequency at the -- at the same time.

And allowing that capability is yet another hallmark of what's provided by a multiplexer/demultiplexer.

THE COURT: All right.

MR. WITTENZELLNER: And if --

THE COURT: Thank you.

MR. WITTENZELLNER: -- if the Court has no further questions, that's -- we're finished with this term.

THE COURT: Then we're finished with this term.

Let's go on to the next one --

09:56:26 MR. WITTENZELLNER: Thank you, Your Honor.

09:56:26 THE COURT: -- which is "a communication protocol" from the independent claims. Let me hear from Plaintiff first -- well, actually, Plaintiff is proposing plain and ordinary meaning.

09:56:39 Let's reverse the order. Let me hear from the Defendants first on this.

09:56:46 MR. LANDIS: Your Honor, Todd Landis again for Defendants/intervenors.

09:56:50 Your Honor, the real crux of this argument is what is a protocol, and does it differ from a -- a signal or more particularly, a carrier signal?

09:57:05 I think the confusion that has happened a lot in the previous case and in this is what is -- you know, what is the difference between a protocol and a carrier signal?

09:57:19 In these claims, we have infra-red, we have radio frequency. Both of those are carrier signals. They're -- they're means to carry something. There are no specific protocols that are called IR protocol or RF protocol. There are protocols that use RF. There are protocols that use IR. There are protocols that can use both.

09:57:45 But the protocol itself is a set of rules and formats for messages that would be communicated between two devices. Those rules and formats are what get carried on either an IR transmission or an RF transmission.

And so the real dispute here is just making protocol what it's supposed to be, because in the previous case, Plaintiff's expert tried to argue that protocol was something much broader than what it really is.

And so we believe that -- that we have to limit this down to what it really is, which is the rules and formats of messages that are exchanged between devices so that they can communicate.

THE COURT: Let me -- let me ask --

MR. LANDIS: It is not how those messages are carried.

THE COURT: Let me ask you this, Mr. Landis. In determining what it really is, I believe is the way you put it, the Court's been referred to a 2016 dictionary definition.

Tell me the level of appropriateness for the Court to apply a 2016 definition to a patent that was filed in 1995. It clearly post-dates the document at issue here.

MR. LANDIS: Your Honor, I -- I completely agree that that is not something that I would generally do to the -- you know, present to the Court, you know, and I -- and, again, I'm -- I'm not making excuses, Your Honor. The fact of the matter is, I didn't have access to the other earlier Newton's Telecom Dictionaries, you know, and I still don't have access to them. I still couldn't get

09:59:27 access to them.

09:59:28 But, you know, from what I understand, the earlier
09:59:32 definitions wouldn't be any different from this definition.
09:59:35 You can go all the way back to the early 90's, and the
09:59:39 definition of protocol is going to remain the same.

09:59:42 It is going to be a set of rules and formats for
09:59:44 messages that are exchanged. That's the whole purpose of a
09:59:47 protocol is to have a common set of rules and formats so
09:59:50 that everyone that's manufacturing these devices can know
09:59:55 that if I send a -- if I format a message in a certain way,
09:59:59 it's going to cause a certain operation.

10:00:01 And that's the whole purpose of having a protocol,
10:00:05 it's the whole reason these organizations come up with
10:00:08 protocols, like Bluetooth, or, you know, WiFi protocols and
10:00:13 numerous others.

10:00:15 It is so that we don't have -- (audio beeps)
10:00:18 manufacturers have individual messages and formats. We
10:00:22 have one universal set of rules, set of formats that
10:00:26 everyone using a Bluetooth device, for example, will use.

10:00:31 THE COURT: All right. Let me hear from Plaintiff
10:00:33 in response.

10:00:34 MR. KEYHANI: Your Honor, the patentee, who was
10:00:41 clearly one of skill in the art -- and the Court became
10:00:45 familiar with Mr. Salazar and the patent attorney also who
10:00:49 drafted this. And both of the patentees -- there's two

patentees -- they chose to use the word "communication protocol," "a communication protocol." It's -- the entire specification is filled with references to communication protocol.

There is no reference anywhere in the specification to the term or what Defendants' counsel is arguing in position of this motion under rules. It's broader than that. It's nuanced. And it doesn't need to be defined.

The -- the parties tried the case, and there was no -- Defendants' expert in the prior case did not have a difficult time understanding the term "communication protocol," nor did he ever indicate that in his testimony.

It may not be defined -- plain and ordinary meaning controls. There's no indication that the patentee wanted to redefine it in any way, or there's been no clear or unmistakable surrender.

And so it's really a narrowing or a tweaking in a -- in a narrowing sense, again, to -- to limit the scope of the claim. And there's no basis to do that. It's a protocol. It -- it might include rules, but it's not limited to rules. And there's no reason to limit that. There's no reference.

An external -- you know, some dictionary from 2016 has no -- first of all, external evidence has no real place

here. We have an intrinsic record that's complete. And there's no testimony -- we have the opinion of Defendants' counsel, but we have no expert testimony to support how one of ordinary skill in the art would -- would believe that there should be a unique construction for this term or it's necessary.

And so we see no reason to change what's there. I mean, that's a term that's used -- if you search the patent, you know, numerous times, probably over a dozen times -- over a dozen times probably.

And there's no reason -- and so -- so we're -- we're going to be replacing what the patentee chose to use as -- as his term -- as the patentees chose to use as his term to define his invention. And, I think, Your Honor, he's entitled to define his invention as he chose.

THE COURT: All right. Let's move on. I think I've heard enough on this one. Let's heard on -- let's turn on -- let's move on to "a plurality of reprogrammable communication protocols."

And here, the Defendant tells me that this is indefinite because protocols can't be reprogrammed. So let me hear the argument from Defendant first, and then I'll hear Plaintiff's argument for plain and ordinary meaning.

MR. LANDIS: Thank you, Your Honor. Todd Landis again for Defendants/intervenors.

10:03:46 Your Honor, the heart of this argument is -- and
10:03:48 we did put indefinite in our briefing, Your Honor. We also
10:03:52 put in a construction. We put indefinite because
10:03:55 reprogrammable is an adjective. It's not a noun. It's an
10:03:59 adjective. And it's -- it's modifying communication
10:04:04 protocols.
10:04:04 So this argument does somewhat go back to the
10:04:08 argument we just had, which is what is a communication
10:04:10 protocol because we need to know whether that thing can be
10:04:13 reprogrammed or not. And the fact of the matter is
10:04:17 communication protocols aren't programs. They are sets of
10:04:21 rules and formats. They are generally created by
10:04:25 organizations sitting in a boardroom somewhere writing out
10:04:29 a giant document which tells you how you're going to do
10:04:32 things.
10:04:32 And so to have a reprogrammable communication
10:04:36 protocol, if you're truly going to interpret those words,
10:04:39 which is what we're tasked with doing, then it would have
10:04:43 to be that the rules and the formats of that protocol can
10:04:48 be changed through programming.
10:04:50 THE COURT: Well, let me stop you there --
10:04:52 MR. LANDIS: That should be the --
10:04:53 THE COURT: -- let me stop you there. If we're
10:04:54 going to talk about adjectives and the intricacies of
10:04:59 English grammar, in your alternative construction, is

programming a noun or a verb? Changed through programming, is that something, or is that action?

MR. LANDIS: So in -- in that context, Your Honor, I -- I do believe it is a noun in that context because it follows the -- the -- the -- the word "through." So I don't think, if I understand English well enough, that it could be a verb.

But I'm not sure it changes my -- my argument, because the -- the fact of the matter is what we're saying here is something has to be able to be reprogrammed.

The thing that needs to be able to be reprogrammed through programming are the sets of rules and formats. Can they be changed through programming?

THE COURT: Is that programming limited to software, in your view?

MR. LANDIS: I mean, I think in a practical sense, Your Honor, it could be firmware where -- where this -- this -- you know, the protocol could lie, but I think in -- for most practical purposes, it would be software.

THE COURT: But you're not telling me it would be limited to software?

MR. LANDIS: I -- I'm not -- not saying it would be limited to software. I think my argument is more about what needs to be changed through the programming as opposed, you know, to -- to anything else.

So I'm not saying it would be limited to software. I'm just saying that the thing that needs to be changed would be the actual rules and formats of the communication protocol. That's the only way to make sense of this term.

We -- we believe the term is indefinite because no one of skill in the art would ever consider a communication protocol to be reprogrammable. They are, you know, generally done by organizations.

THE COURT: Tell -- tell me what your evidence is as to why no one of ordinary skill in the art would consider a protocol to be reprogrammable. Tell me what supports that, other than your argument today.

MR. LANDIS: So -- so -- so, Your Honor, what supports that for me is just -- again, it's going back to what we believe the proper definition of protocol is, whether it's communication or any other type of protocol. And that is that it's a set of rules and formats. It's not a program.

And because one of skill in the art would understand that is the meaning of protocol, they would also understand you can't -- you don't reprogram that. It's not a program. You reprogram programs. Whether they exist in firmware or they exist just purely in software, that's what's getting reprogrammed.

THE COURT: All right. So this is really a second

round of argument about what is or isn't a protocol?

MR. LANDIS: In many ways, Your Honor, yes.

THE COURT: Okay. Let me hear from the Defendants, please -- excuse me, the Plaintiff.

MR. KEYHANI: Thank you, Your Honor.

Your Honor, the -- the claim language that includes this -- this clause, a plurality of reprogrammable communication protocols, is also part of a larger claim element, a microprocessor -- I'm reading the first element of the body of the claim: A microprocessor for generating a plurality of control signals used to operate said system, said microprocessor creating a plurality of reprogrammable communication protocols, for transmission to said external devices -- devices wherein each communication protocol includes a command code set that defines a signal -- the signals that are employed to communicate with each one -- each one of said external devices.

One of ordinary skill in the art -- Mr. Salazar and Mr. Molero, both clearly are skilled in the art, as well as their patent attorney, fully understood -- you know, fully understand and chose these words.

And one of ordinary skill in the art in the context -- context of the specification and the claim language would understand what -- what the scope of this claim is, clearly would understand the scope of this claim and would be able

to practice this claim.

There is no evidence that Defendants have brought here or have referenced anywhere, any kind of evidence to show that one of ordinary skill in the art would not understand this term. And even Defendants' counsel concedes that -- which is true, which our experts would -- Plaintiff's experts certainly would -- would testify to at trial that this is clearly understandable to one of ordinary skill in the art, the scope of which is understandable.

And reprogrammable and communication protocols in this context -- in this context clear -- clearly can be reprogrammable. And that's what the patentees and that's what their patent attorney drafted. That's what the patentees defined. And there's no reason to -- no support.

And, certainly, Your Honor, Defendants do not bring here -- let alone any evidence, do not bring clear and convincing evidence, which is what is necessary under the law, as Your -- as Your Honor is aware, to -- to -- to claim or to make the argument that this would be, you know, indefinite or one -- that one of skill in the art would not understand the scope of this.

It's a very high burden, and we have no evidence to support that whatsoever. And there's no reason to depart from the ordinary meaning of communication

protocols, which is, as Defendants' counsel argues, is part of their -- the issue. There's no reason to interpose this definition of -- of rules or this -- this construction of a set of rules into the definition of communication protocols.

Again, as we -- we discussed earlier, there's no such reference in the -- in the patent, and all we have is attorney argument.

And so the plain and ordinary meaning should stand, Your Honor. And there's no reason to depart from that.

THE COURT: All right. Thank you, counsel.

MR. KEYHANI: Thank you.

THE COURT: Let's move on to the next term, "such that the memory space required to store said parameters is smaller than the memory space required to store said command code sets" from Claim 1.

Plaintiffs are telling me this should be plain and ordinary meaning, and Defendants are telling me it's indefinite.

Let me hear the Defendants' argument as to indefiniteness first, and then I'll hear Plaintiff's response.

MR. WITTENZELLNER: Your Honor, John Wittenzellner again. May it please the Court.

10:11:39 THE COURT: Please proceed.

10:11:40 MR. WITTENZELLNER: The dispute here, Your Honor, and why we believe this term is indefinite is because said parameters, as recited in the claims, does not inform a skilled artisan as to which of the previously recited parameters that term refers to.

10:11:57 THE COURT: So this is --

10:11:59 MR. WITTENZELLNER: And this --

10:12:00 THE COURT: -- this is an antecedent basis argument?

10:12:01 MR. WITTENZELLNER: Correct, Your Honor.

10:12:03 THE COURT: Okay.

10:12:03 MR. WITTENZELLNER: And when we look at the claim language -- and this is in the memory device limitation -- when we unpack this, it becomes clear what the issue is.

10:12:18 Second line of that limitation, which is on Column 26, recites a plurality of parameter sets. And then said parameters occurs later in the claim.

10:12:29 And I don't think that there's any controversy that a parameter set can include more than one parameter. But said parameters, as recited later, doesn't match up with parameter set.

10:12:43 So that leaves the question of which parameters within a plurality of parameter sets is it referring to? And it can really refer to a pretty broad range of

parameters. Putting aside the arguments earlier about the ordinary meaning of plurality, a plurality of parameter sets includes many individual parameters.

And so said parameters could refer to that large universe of parameters. It could refer to a subset of parameter sets within that plurality. It could refer to a subset of parameters from all the parameter sets in the -- in the plurality, a subset of parameters from one parameter set, or potentially individual parameters from different parameter sets within the plurality of parameter sets.

And so we're left -- we're really left unable to determine which one it refers to. And this lack of clarity, Your Honor, is a fatal flaw for the term because the term calls for a comparison.

The memory space to store -- to store said parameters must be smaller than the memory space required to store said command code sets.

But given this large range, Your Honor, due to the lack of clarity in the claim term, there's no way to make a meaningful comparison. For example, if said parameters is interpreted to include only the smallest portion of a plurality of parameter sets, this claim limitation may necessarily be met rendering the entire claim term superfluous.

Salazar argues on Page 6 of its reply brief that

said parameters clearly refers back to the parameter sets previously referenced. But I think they were very careful in choosing their words.

What Salazar did not say, Your Honor, is that said parameters refers to the actual recited term, which is the plurality of parameter sets. So we're still left with the lack of clarity that renders the term indefinite.

THE COURT: Let me -- let me --

MR. WITTENZELLNER: We have nothing further. Sorry, Your Honor.

THE COURT: Let me ask you this, Mr. Wittenzellner. At one end of the spectrum, there's absolutely perfect patent drafting. At one end of the spectrum, there's such horrific patent drafting that nobody knows what the drafter is talking about. That's a wide spectrum, in my view. And there are clearly places along that spectrum where a reasonable person can't clearly understand what's intended.

But there are also places along that spectrum where it's somewhat imprecise, a little bit off, but not so imprecise and not -- not so much off that a reasonable person and a person of ordinary skill can't determine with a fair amount of certainty what the patentee is talking about.

And it appears to me there's a -- an argument

here, and I assume the Plaintiff will make it, that said -- the said parameters here does refer back to the plurality of parameter sets and that this is not so imprecise, it's not so -- so horribly vague that a reasonable person, a person of ordinary skill wouldn't be able to read it and know what's being talked about.

That's the argument I'd make if I was the Plaintiff. Tell me why that argument is wrong. Tell me why this is so far toward the other end of the spectrum that no reasonable person would have any idea what the patentee is talking about.

MR. WITTENZELLNER: Certainly, Your Honor.

So I think the big issue here is that Plaintiff did not make that argument in their reply brief and left ambiguity in the term.

THE COURT: Well, I'm -- I'm asking you about it now.

MR. WITTENZELLNER: Correct, Your Honor.

So if said parameters were to be construed to mean the plurality of parameter sets introduced earlier in the limitation, I would have a hard time arguing that that's indefinite, Your Honor.

But what Plaintiff did in its reply brief is Plaintiff said the memory space to require, quote, said parameters refers to the parameter sets, not the plurality

of parameter sets.

So I believe they're still trying to leave a door open for ambiguity in this claim term and leaving it indefinite.

Now, to your question as to what -- sort of what level of specificity is necessary, it's our position that this term leans more toward the -- the side of not being -- or not having the necessary clarity because what we're -- we're hearing today with regards to whether or not plurality means one or two -- two or more or one and also the lack of clarity in which portion -- or if it's totality, the plurality of parameter sets, this term that parameters refers back to.

THE COURT: All right. Let me hear from Plaintiff in response.

MR. KEYHANI: Your Honor, I -- I think -- I don't really have much to add. I think Your Honor's statement of our position is -- is spot on. There is -- the question isn't whether or not plain language is perfect, because I frankly have litigated for many years patent cases, and invariably there's language that could be a little more clean or clear.

The question is whether it's so incomprehensible to one of skill in the art. And it's not. Clearly -- I mean, within the specification, there's interchangeable

reference to sets of parameters, parameter sets.

Even the Court in its opinion, you know, uses the word "parameter" and "parameter sets" interchangeably. And the plurality of parameter sets -- they're all -- they're clearly a reference to the same parameter sets. And there's no -- and one of ordinary skill in the art wouldn't understand it any differently.

Could it have been -- you know, can claims be drafted perhaps a little more precise and a little more clearly? Perhaps. But there's no evidence, other than attorney argument, that -- that the claim is not -- reasonably clear enough and precise enough to inform one of skill in the art of the scope of the claim and what's being -- and what the invention is -- is reciting and teaching.

And so there's no -- there's no support for a finding that this claim -- this claim element is indefinite, Your Honor.

THE COURT: Let me ask you this, Mr. Keyhani. If I understood Mr. Wittenzellner correctly, he effectively told me that if the Court construed in this context said parameters to be said plurality of parameter sets, he really wouldn't have a problem. If the Court were to do that in this context, would the Plaintiff have a problem?

MR. KEYHANI: Can you state that again, Mr. -- I

mean, Your Honor?

THE COURT: If the Court were to construe said parameters to be said plurality of parameter sets -- in other words --

MR. KEYHANI: So that --

THE COURT: -- to effectively create the antecedent basis that you say is there, he says is not there, and he also says if it is there, you've inaccurately referred back to it.

MR. KEYHANI: Yes, I -- I think we wouldn't have a problem with that. We think it's implicitly understood to one of skill in the art because it's really the capability to create. So you could say said parameter or plurality of parameter sets.

THE COURT: All right.

MR. KEYHANI: However, of course, we're -- we're not -- we obviously have a dispute over what plurality means. Plurality to us means various or different.

But with respect to this particular issue, we don't think it changes the -- the meaning of the claim.

THE COURT: That's -- that's why the Court spent so much time on the first argument because it shows itself again throughout these later terms. I understand.

All right. Let's move on, counsel.

MR. KEYHANI: Thank you.

10:21:29 THE COURT: Let's go next to "a desired command
10:21:36 code set." And let me hear from the Plaintiff first.
10:21:41 MR. KEYHANI: Plaintiff's position is that -- that
10:21:52 this term should have its plain and ordinary meaning.
10:21:54 There's no reason to -- to, again, change the term.
10:21:58 Defendants' argument -- argue that it's
10:22:01 indefinite. Again, there's no evidence to support that --
10:22:04 the proposition that one of skill in the art would have a
10:22:10 difficult time understanding the scope of this claim or
10:22:12 would not understand the scope of this claim.
10:22:14 And the article "a" means one or more according --
10:22:23 you know, in the context of this, as has been understood
10:22:29 and applied in other cases -- for example, Freeny that we
10:22:32 -- we cite.
10:22:33 So it's one or more desired command code sets.
10:22:35 And in the context, again, of the claim, it's really about
10:22:39 a -- a microprocessor capable of generating a desired
10:22:45 command code set. And it's not about any specific command
10:22:51 code set.
10:22:52 It's a desired one, which in context one of ordinary
10:22:54 skill in the art would have no problem understanding that
10:22:56 that is clearly one of the command code sets that would
10:23:02 communicate with one of the various or different external
10:23:05 devices, i.e., the plurality of external devices.
10:23:08 So we don't see any reason for any construction

for one, and certainly there's no reason -- there's no basis to argue that this is indefinite. One of ordinary skill in the art would understand its scope.

And Defendants have -- counsel for Defendants have presented no evidence -- surely any evidence to -- to rise to the level of clear and convincing that one of skill in the art would not understand what a desired command code set means. It's -- it's very -- clearly self-evident, Your Honor.

THE COURT: All right. Let me hear from Defendants and intervenors in response.

MR. WITTENZELLNER: Your Honor, John Wittenzellner again.

Before I delve into this specific term, I just wanted to point out that the issue with respect to this term, which is really whether "a" in combination of different claim language, introduces a new claim term, is also the same argument for said microprocessor generating a communication protocol in response to said user selection.

So I think we can streamline today, if you allow me to briefly touch on that other term, but otherwise we're prepared to handle it separately.

THE COURT: I don't have any big problem with that, counsel, and I'll allow --

MR. WITTENZELLNER: Thank you, Your Honor.

10:24:18 THE COURT: -- and I'll allow Plaintiff's counsel
10:24:21 to respond in the broader context once you're finished.
10:24:24 Go ahead.
10:24:25 MR. WITTENZELLNER: Thank you, Your Honor.
10:24:26 So the dispute here is whether Salazar's choice
10:24:30 when drafting these claims introduce the term desired
10:24:35 command code set along with the indefinite article "a"
10:24:38 means that it is a new claim term, and that's re --
10:24:40 reflected in our proposed construction of a different
10:24:45 command code set than the command code set that defines the
10:24:49 signals that are employed to communicate with each one of
10:24:51 said external devices.
10:24:52 And this simply comes from the claim language,
10:25:08 Your Honor. And the -- the microprocessor limitation in
10:25:09 Claim 1 recites a command code set.
10:25:15 Subsequently, the memory device limitation recites
10:25:21 a desired command code set.
10:25:27 And Salazar chose to use different language here.
10:25:30 Salazar chose to use the term "command code set" in the
10:25:34 microprocessor limitation and the term "desired command
10:25:39 code set" in the memory device limitation.
10:25:41 And Salazar also filed the -- the well-known
10:25:43 convention of patent claiming, of introducing new terms
10:25:46 using the indefinite article "a."
10:25:48 And the Federal Circuit has told us repeatedly

that use of the indefinite article "a" tells us that the two terms are different. And two example cases are the Tuna Processors case, which is 327 Federal Appendix 204, 2009, and the Hill-Rom case from 34 Federal Appendix 733 at -- from 2002.

Now --

THE COURT: I understand that the typical scenario is where claim language says "a widget," then followed down by additional language refers to "the widget."

And here, what I gather the case is, is you're telling me that the claim says "the widget," then later followed by "a widget." Is that -- is it basically a reversal of the typical order?

MR. WITTENZELLNER: No, Your Honor. In both instances, the command code set and desired command code set are both preceded by the indefinite article "a."

So our -- our construction is that they are, in fact, different terms.

THE COURT: Okay. I'm just trying to understand your argument.

MR. WITTENZELLNER: So -- yes, Your Honor.

And so when the claim recites a desired command code set, it is not referring back to the a -- a command code set that was introduced earlier in the claim. It's indeed a different term.

10:27:23 THE COURT: What else?

10:27:24 MR. WITTENZELLNER: One thing I wanted to touch on, Your Honor, from Salazar's reply, and this is on Page 6, is opposing counsel cites to the Apple versus Motorola case from the Federal Circuit for the proposition that, quote, the name of the game is the claim.

10:27:44 And on its face, Salazar chose to draft this claim to -- introducing both terms using the indefinite article "a," combined with other claim language.

10:27:56 And touching on the other term, as Your Honor allowed us to do, said microprocessor generating a communication protocol in response to said user selection, we have a similar situation.

10:28:13 In the microprocessor limitation, the microprocessor creates a plurality of reprogrammable communication protocols.

10:28:19 So here, it's being introduced with the indefinite article "a," and so it's a new claim term. In the user interface limitation, the microprocessor generates a communication protocol -- again, introduced with the indefinite article -- and the later recitation omits the term "reprogrammable."

10:28:39 So similarly here, our position is that the second recitation -- or the second term, "communication protocol," must be different from the plurality of reprogrammable

communication protocols because they use different language, and both are introduced with the indefinite article "a."

THE COURT: All right.

MR. WITTENZELLNER: And we have nothing further on these terms unless the Court has any questions.

THE COURT: Let me hear a -- a response from Plaintiff addressing both of these arguments or their application in two different ways.

MR. KEYHANI: Your Honor, the term -- the term "a" means one or more and has been -- been deemed to mean one or more -- for example, in Freeny versus Fossil.

But really as we've argued before, we have to look at the specification. And one of ordinary skill in the art would understand the meaning of this term "a desired command code set." Clearly, in the context of the claim language and the specification, no construction is necessary.

And it isn't -- it's not indefinite. Clearly, it's speaking about the microprocessor being able to create a desired command code set from the universe of command code sets that are -- that are earlier referenced.

To try to, you know, construct some semantical argument that deviates from the plain and ordinary meaning to one of skill in the art would -- would frustrate the --

the disclosure of the invention and the very -- you know, the -- the recital of the claims.

Clearly, a desired command code set is not, again, one out of thin air. It's one from the universe of command codes that is referenced earlier, and it's one or more, but it's any one of that universe.

And, again, here, we have attorney argument by the Defendants. There's no expert testimony that -- or any support to -- to argue that this is indefinite, as it is -- as it is recited, and that one of ordinary skill in the art would understand the scope of this. And this goes for the -- the other term also argued in conjunction with -- with the "a desired command code set." The same argument applies, Your Honor.

We don't need to -- to rewrite this. It's clear in the context of the claim language itself that when we're talking about a desired -- desired command code set, we're talking one from the universe of command code sets that's being discussed earlier in the claim.

THE COURT: Touch briefly, if you will, Mr. Keyhani, on the Defendants' argument that this should be -- if it's construed, should be a different command code set or should be different from the reprogrammable communication protocols in these two contexts.

Focus on the word "different" here. What's the

10:31:50 justification or lack of justification?
10:31:51 MR. KEYHANI: Just a moment, Your Honor.
10:31:57 The claim language itself -- the broader claim
10:32:13 language, it's always important to start with the claim.
10:32:16 The claim is the name of the game, as we said -- or the
10:32:20 Federal Circuit has said.
10:32:22 This is Column 6 -- 26, I'm sorry, of
10:32:25 the '467 patent, at the top, Line 1. A memory device
10:32:30 coupled to said microprocessor configured to store a
10:32:34 plurality of parameter sets retrieved by said
10:32:38 microprocessor so as to recreate a desired command code
10:32:40 set.
10:32:41 So we're talking about such that the memory space
10:32:43 required to store said parameters is smaller than the space
10:32:46 required to store said parameter set. To recreate a
10:32:49 command code -- so if we go back --
10:32:50 THE COURT: Slow down.
10:32:51 MR. KEYHANI: -- earlier in the claim. I'm sorry.
10:32:56 So I was just reading the -- I was reading the
10:32:59 claim language that states -- and I'll -- I'll repeat the
10:33:02 last part, Your Honor.
10:33:03 A memory device coupled to said microprocessor
10:33:09 configured to store a plurality of parameter sets retrieved
10:33:13 by said microprocessor so as to recreate the desired
10:33:20 command code sets -- command code set.

10:33:22 And in the context of this claim, we're talking -- the desired command code set is -- clearly be understandable to one of ordinary skill in the art as one of the command code sets in the universe of command code sets that would be available to -- to communicate with external devices, because what we're talking about here is the capability to recreate a command code set and not creating any particular command code.

10:33:59 THE COURT: All right.

10:33:59 MR. KEYHANI: And there's no evidence -- there's -- so it -- it's -- it's one of the universe, one or more -- one or more of the universe of command -- of the commands in the universe that -- that's previously mentioned.

10:34:17 It's not a different -- some different command. It's -- again, this goes back to -- Your Honor, this underlined -- this issue is the argument raised by -- again, seeping in back here is -- are these commands -- are these created, you know, out of thin air? They're not. They are commands for existing devices -- for existing external devices.

10:34:43 And you're -- and -- and the whole purpose of the invention is to take information, parameter sets, from -- and then recreate command code sets for a desired -- you know, a desired command code set for a particular external

device.

But it's all relating to the same universe of potential commands for the universe of external devices.

It's not some new command, and that's, again -- the -- the argument the Defendants are raising today is basically the same argument they raised before, that somehow is creating a command -- a desired command for something that doesn't exist, or it's creating a desired command out of thin air. That's not the case, Your Honor.

It's creating -- it's a desired command of one of the commands in the universe of commands that are in existence -- that can communicate with the existing -- existing external devices, Your Honor.

THE COURT: I understand.

MR. KEYHANI: It would make no sense --

THE COURT: I understand your argument.

MR. KEYHANI: I'm sorry. Thank you.

THE COURT: Mr. Wittenzellner, do you have just a brief word on this particular aspect of it? Is this --

MR. WITTENZELLNER: I do, Your Honor. Thank you for the opportunity to respond.

THE COURT: Let's make it brief, please.

MR. WITTENZELLNER: Yes, Your Honor.

So I believe I heard Mr. Keyhani say that we need to rewrite these claims to have the proper -- proper

reference back to the earlier recitations, whether it be command code set or reprogrammable communication protocols.

And if that is the case, if I understood him correctly, the Federal Circuit has told us repeatedly, that it is, quote, their settled practice that they will not -- that they will construe the claim as written, not as the patentees wish they had written it. And that comes from the Chef case, 358 F.3d 1371 at Page 1374.

And unless I missed it, I believe that Mr. Keyhani did not respond regarding what the communication protocol recited in the user interface limitation refers back to, whether it refers to the same reprogrammable communication protocols, or is it something different.

And it's our position that they are different because Mr. Salazar chose to use the term "reprogrammable communication protocols" in the first instance and "communication protocol" in the second instance. So they should be something different.

And we were told earlier today that Mr. Salazar and his patent attorneys, according to Mr. Keyhani, were skilled in the art, so they would understand -- understood those patent conventions and what these terms would mean.

So unless the Court has any further questions, Your Honor, we have nothing else.

THE COURT: All right.

10:37:25 MR. KEYHANI: Your Honor -- I'm sorry, Your Honor, if you may, I -- I did not respond to the said communication protocol. That was a second term brought in. If Your -- Your Honor would indulge me for a moment, if I could just respond to that.

THE COURT: Very briefly.

MR. KEYHANI: Thank you.

If you -- again, as we argued before, the -- first of all, we -- we've never said that we have to rewrite the claims. We -- what we said is one of ordinary skill in the art would understand the full scope of the claims as written.

THE COURT: I --

MR. KEYHANI: And the said communication --

THE COURT: -- I saw you shaking your head left to right, no, no, no, as he said that. Be glad we're on a TV monitor. If you'd done that in open court, I would have probably said something about it. If the jury had been in the box, it would have been bad.

MR. KEYHANI: Understood.

THE COURT: Okay.

MR. KEYHANI: Understood, Your Honor. It would not happen in open court.

Said communication protocol, if you look at -- if you look at the last claim element in Claim 1 -- and we've

10:38:31 argued this in our briefing, but I'm just pointing at --
10:38:37 Your Honor's attention -- it says: An infra-red-- this is
10:38:42 the last claim element of Claim 1. And it says: An
10:38:43 infra-red frequency transceiver coupled to said
10:38:46 microprocessor for transmitting to said external devices
10:38:49 and receiving from said external devices, comma, infra-red
10:38:55 frequency signals in accordance with said communication
10:38:59 protocols.
10:38:59 It specifically speaks to communications, Your
10:39:03 Honor, with external devices. And in accordance with
10:39:08 communication protocols, clearly the communication
10:39:12 protocols here that are being referenced are the
10:39:19 communication protocols that are referenced earlier in the
10:39:23 claim that are described as the communication protocols
10:39:28 that are communicating with the external devices.
10:39:31 There are no other communication protocols in this
10:39:33 claim other than the communication protocols, Your Honor,
10:39:35 that are communicating with the external devices.
10:39:38 So as -- as -- it is a basic canon of patent law
10:39:46 that you can -- look at other claims in -- other claim
10:39:48 elements within the claim to -- to clarify any
10:39:50 understanding about words or terms in the claim.
10:39:54 And this, again, is -- is an additional -- in addition
10:39:56 to it being understood by one of ordinary skill in the art
10:39:59 without reading this element, it's clear that the -- and --

and here it says, said communication protocols.

So the last paragraph is referring back to the prior reference to communication protocols in the second to the last paragraph of the claim.

And that reference is all back to a reference to -- communication with external devices that is referenced in the first paragraph of the body of the claim, not the preamble.

So, clearly, communication protocols -- the said communication protocols is clearly a reference to a plurality of reprogrammable communication protocols. Those are the only communication protocols that are -- that are communicating or providing the -- the basis for the communication with the said -- sorry, with one of said external devices.

And -- and with each one of said -- each one of said external devices -- excuse me, Your Honor. So by -- by looking at the claim language, the last paragraph of Claim 1, the body of the claim, and the association of communication protocol with a reference to the external devices communication. And that refers back to the prior communication protocol that also refers back to the -- to the communication protocol in the first claim element of the body of the claim, all linking together these communication protocols that one of ordinary -- ordinary

skill in the art would understand are all the same communication protocols.

There's only one communication protocol we're talking about. We're talking about the communication protocols which are earlier referenced as a plurality of reprogrammable -- reprogrammable communication protocols that are communicating with the external devices.

And so this is not a different one. And no -- no more so than a desired command code set is a different one. It's one up from the universe. It's a command code set, one of many from the universe of command codes.

THE COURT: All right. I think I understand the competing arguments from the parties here.

Before we go on to the next term for dispute and construction, we're going to take a short recess, counsel. Please just stay on your connections, mute your devices, and I'll be back shortly, and we'll continue.

The Court stands in recess.

(Recess.)

THE COURT: All right. Counsel, the Court will return to the remaining matters for claim construction in Salazar versus AT&T Mobility, et al.

We'll pick up with the next disputed term, "a microprocessor for generating, said microprocessor creating" -- no -- yes, yes -- and "a plurality of

parameter sets." This is from Claims 1 and 34 of the patent-in-suit.

Let me hear from the Plaintiff first.

And to the extent we're replowing ground already covered, let's just make a note of that and move on to ground that hasn't previously been plowed.

MR. KEYHANI: Yes, Your Honor. So the term we're -- is it said micro -- microprocessor generating a communication protocol in response to said user selections? Is that the term we're on? No. 8? No, sorry, No. 7.

THE COURT: Well, I have it alphabetically as G, so...

MR. KEYHANI: Okay.

THE COURT: It's the one that follows "a desired command code set," and precedes "said microprocessor generating a communication protocol."

MR. KEYHANI: All right. Thank you, Your Honor. I'm sorry. Yes, I -- I follow you, Your Honor, yes.

A microprocessor for generating..., said microprocessor creating..., a plurality of parameter sets retrieved by said microprocessor..., said microprocessor generating."

THE COURT: That's it.

MR. KEYHANI: I -- I just took up -- yes.

Your Honor, our -- first and foremost, as we

argued in our brief and noted earlier in this hearing, the "for generating" is a reference to the -- this being a capability claim -- claim. In other words, it's a microprocessor that's capable of generating.

Defendants' counsel -- Defendants have conceded this argument in their briefing, that it is -- they agree that it's a capability claim.

This Court articulated that construction -- that conclusion, as well, in the prior case. And the -- the question is, is it one microprocessor, or is it any number?

We argue the Plaintiff's position is it's any one of multiple microprocessors. And we do cite to -- in our reply, for example, we cite to the Freeny case as an example. That's just one of many cases. That's this Court's precedent which relies on, of course, the Federal Circuit precedent that a microprocessor is a reference to any one of multiple microprocessors.

So it's any one of -- of -- of -- it's any one of multiple microprocessors capable of the various actions that -- that come after that.

And we had a difficult time following Defendants' argument in their briefing because their construction seemed to -- their proposed construction used the word "must perform some functionality," but then the conclusion in their argument -- and their argument seemed to concede

that it is a capability claim.

But at any rate, we think there's no -- no dispute that it's a capability claim, that it's the microprocessor's ability -- capability to function and do the various activities, and that it is one or -- one or more microprocessors -- processors, any one of which, as the Court analyzed and hereby analogy -- any one of the microprocessors only need be capable of doing one or more of the various actions recited in the claim, any one of the microprocessors.

And that's how we believe this Court had applied the similar factual situation without getting into that where there was a ref -- reference to a particular component that operated in that context.

I will wait for Defendants' counsel argument for any rebuttal. Thank you.

THE COURT: Let me hear from Defendants and intervenors.

MR. LANDIS: Thank you, Your Honor. Todd Landis again for Defendants and intervenors.

So first, I'd like to make a point of clarification, Your Honor, because I hear Mr. Keyhani keep talking about we're conceding "capable of."

In the previous case -- and I think Mr. Keyhani's position on this term is, is that to the extent not covered

by this Court's construction in the first case, plain and ordinary meaning, Your Honor, for the first element of Claim 1 and Claim 34 construed the microprocessor limitation to be a microprocessor configured to generate a plurality of control signals used to operate said system and configured to create a plurality of reprogrammable communication protocols.

That's the Court's construction. And I think, if I understand Mr. Keyhani's position, Salazar agrees to adopt that construction or that we should adopt that construction.

With that said, Your Honor, the argument here is one that comes from Federal Circuit precedence, In re Varma and another case called Convolve. And I know Your Honor is familiar with those cases, having rendered his Plano Encryption decision where I believe you referenced both of those cases in the decision.

What we have here is a claim that claims a microprocessor. No one is arguing to the Court that "a" does not mean one or more.

"A" means one or more in patent parlance when following the word "comprising." That's well-settled law. It was also well-settled in Varma and in Convolve. The Federal Circuit acknowledged that point in both of those cases.

But what the Federal Circuit then said was "a" cannot serve to negate what is required by the claim -- the language that follows "a." That's the important point. Just because it's one or more doesn't mean it starts to negate the rest of the claim language.

If we look at Claim 1 as an example here -- Claim 34 is almost identical -- we see that the microprocessor needs to be configured to do four things throughout the claim:

Generate a plurality of control signals. That comes from the first element.

Create a plurality of reprogrammable communication protocols, also from the first element.

It has to retrieve a plurality of parameter sets. That comes from the memory device element. It's not written as retrieved there, Your Honor. It's kind of written in the -- in the, you know, passive way, plurality of parameter sets retrieved by said process -- microprocessor.

And then it has to generate a communication protocol in response to user selections. That comes from the user interface element.

Now, the claims also have more to do with this microprocessor because the microprocessor has to be coupled to the memory device, and it has to be coupled to the user

11:06:57 interface.

11:07:00 The Convolve case is an informative case on this
11:07:04 point. In Convolve, the Court was faced with a similar
11:07:07 situation. They had the preamble that introduced an
11:07:11 element with the word "a," and then the claim terms
11:07:17 introduced new -- new components that worked with that
11:07:23 thing, which in that case was a processor.

11:07:25 And the Federal Circuit said: When you're
11:07:30 coupling or working with or doing something and you're
11:07:34 using the word "said," it's referring to the same
11:07:37 processor.

11:07:40 The quote from Convolve, which is Convolve, Inc.,
11:07:45 versus Compaq Computer Corp., 812 F.3d 1313, the Court
11:07:52 said, quote, this reference to the processor, referring
11:07:54 back to the a processor, recited in the preamble supports a
11:08:00 conclusion that the recited user interface is operatively
11:08:05 working with the same microprocessor to perform all of the
11:08:09 recited steps.

11:08:11 We have the same issue here. We have a
11:08:16 microprocessor that's coupled to the memory device, coupled
11:08:20 to the user interface. It's referred to as said
11:08:24 microprocessor, which "said" and "the" are interchangeable
11:08:27 in patent law, as I know Your Honor knows. And it's
11:08:30 referring back to a microprocessor.

11:08:33 So under Convolve, for those two limitations, the

11:08:37 coupling should be to the same microprocessor, which means
11:08:40 that same microprocessor has to perform the functions that
11:08:47 are associated with each of those limitations, which is the
11:08:50 retrieving of plurality parameter sets, generating a
11:08:55 communication protocol.
11:08:56 But I would submit, Your Honor, that when you take
11:09:00 Convolve and combine it with Varma, you have to have the
11:09:04 same processor that performs all four functions that
11:09:07 I mentioned earlier.
11:09:08 As I think Your Honor is familiar with Varma. In
11:09:12 Varma, the Court found -- used an example. The example was
11:09:18 for a dog owner to have a dog that rolls over and fetches
11:09:22 sticks, it does not suffice that he have two dogs, each
11:09:26 able to perform just one of the tasks.
11:09:31 That is what the Plaintiff in this case is arguing
11:09:33 for. It's to have two dogs -- or actually four dogs that
11:09:38 perform all of the -- each -- each performing one of the
11:09:41 tasks.
11:09:43 But Varma and Convolve together say, no, "a"
11:09:50 doesn't get you that. When you claim this way, you have to
11:09:56 have at least one processor that's configured to perform
11:10:00 all of these tasks, generating a plurality of control
11:10:04 signals, creating a plurality of reprogrammable
11:10:08 communication protocols, retrieving a plurality of
11:10:12 parameter sets, and generating a communication protocol in

response to user selections. The same processor needs to perform all four functions under Federal Circuit law.

That's all I have, Your Honor, unless -- I will mention one other thing, Your Honor. Mr. Keyhani mentioned the Freeny case. The Freeny case was a Judge Payne decision.

I would just mention that in Freeny, Judge Payne did not analyze Convolve at all. He only analyzed the cases that the parties brought to his attention, at least in his opinion that I -- that I read. And I think if Convolve had been analyzed, a different decision may have been rendered in that case.

THE COURT: All right. Thank you, Mr. Landis.

Mr. Keyhani, do you have anything in response, and then we'll move on?

MR. KEYHANI: I do, Your Honor, briefly. Thank you.

I -- I -- we don't -- Plaintiff does not agree with Defendants' counsel's articulation of the Federal Circuit law. And we do agree with Judge Payne's interpretation of the existing law on this matter. And I don't think -- I don't think this is a new proposition that the Federal Circuit has come up with that's being reported here or argued.

"A" means one or more, one or more

microprocessors. And whatever follows can be attributed to any one or more of those microprocessors. And as the Court found in Freeny -- held in Freeny, this Court held in Freeny, for example -- and this is Freeny 2019 Westlaw 2078783 at 14 through 15, and it's a quote: When the claim refers to outputting the request authorization code on the first signal and outputting the request authorization -- authorization code on a second signal, that language means that any one or more request authorization codes can be outputted on the first and second signals to satisfy the claim.

And that is -- and this is a 2019 case, May 2000 -- just last -- last summer, and it is good precedent, it's good law, and is also consistent with our interpretation of the law.

And it -- sometimes you have a microprocessor -- as I've been advised by our experts, it's a group of microprocessors with a master microprocessor. Whatever the situation is, however it's formulated, it may be one or a group of microprocessors. There might be a master microprocessor that -- that directs others.

Regardless, it is often the case where you have various microprocessors or submicroprocessors that are implicated in the various steps in the -- in the functionality.

11:13:20 And you wouldn't have to identify in a claim each
11:13:27 different microprocessor. It would be sufficient, as this
11:13:30 Court held in Freeny, you know, summarizing the controlling
11:13:35 law on this subject that -- on this issue that any one of
11:13:41 the microprocessors could, in fact, carry out any one of
11:13:44 these -- of these particular functionalities that are
11:13:48 recited in the claims. And sometimes it wouldn't make
11:13:51 sense that one microprocessor does everything, as a
11:13:53 practical matter.
11:13:54 And so that is our position on this issue, Your
11:13:57 Honor.
11:13:57 THE COURT: All right. Thank you, counsel.
11:13:58 Let's move on --
11:14:00 MR. KEYHANI: Thank you.
11:14:01 THE COURT: It appears to the Court the next
11:14:03 disputed term for construction is "an infra-red frequency
11:14:10 transceiver coupled to said microprocessor for transmitting
11:14:13 to said external devices and receiving from said external
11:14:19 devices, infra-red frequency signals, in accordance with
11:14:27 said communications protocols."
11:14:29 Plaintiffs has proposed the plain and ordinary
11:14:31 meaning, to the extent this is not covered by the Court's
11:14:34 previous opinion and claim construction order in the
11:14:37 earlier HTC case.
11:14:39 Defendants have proposed their own construction,

and I'd like to hear -- in that case, I'd like to hear from Defendants first, and then I'll hear from Plaintiffs in response.

MR. LANDIS: Thank you, Your Honor. Todd Landis again for Defendants and intervenors.

Your Honor, the crux of this issue really comes down to the word "and" --

THE COURT: So the receiving --

MR. LANDIS: The claim language --

THE COURT: -- the receiving device has got to send back to the base station?

MR. LANDIS: Yes, Your Honor.

THE COURT: That's your view?

MR. LANDIS: That's correct.

THE COURT: Okay.

MR. LANDIS: That's -- that's our view, Your Honor, that the word "said external devices" here is in both the transmitting element -- or -- or the transmitting portion of the element and the receiving portion of the element. Both refer to said external devices, which in our opinion makes them the same external devices. And the claim uses an "and."

So the infra-red frequency transceiver here has to be capable of transmitting to some external devices and receiving from those same external devices infra-red

11:15:50 frequency -- infra-red frequency signals, in accordance
11:15:52 with said communication protocols.
11:15:55 We'll get to what that may or may not mean later, but
11:15:59 that is really the crux of this issue, that the claim
11:16:03 language requires that when you have these external
11:16:06 devices, this -- whatever this infra-red frequency
11:16:09 transceiver is, it has to be able to just transmit to it
11:16:13 and receive from it.
11:16:14 THE COURT: Let me stop you there. It has to be
11:16:16 able to, or it must do it? When you -- when you press the
11:16:21 button on the base station to change the channel on the TV,
11:16:24 does the TV have to send a message back to the base station
11:16:27 that says, I changed it -- I changed the channel? Or --
11:16:32 MR. LANDIS: So, Your Honor, I think I understand
11:16:34 Your Honor's question.
11:16:34 I don't believe it has to necessarily be a
11:16:39 response to the transmission. I'm not sure that's what
11:16:42 this claim requires.
11:16:43 I just think that what this claim requires is, is
11:16:46 that the TV has to have the ability to send some IR
11:16:52 frequency signal that's in accordance with the
11:16:56 communication protocols back to the infra-red frequency
11:16:58 transceiver.
11:16:59 It doesn't necessarily have to do it in response to a
11:17:02 transmission. It just has to have the capability of doing

that.

THE COURT: Now, are we talking about the capacity of the television, or are we talking about the capacity of a base station which is the patented device?

MR. LANDIS: Yeah, so we're really talking about the capability of -- of the -- the infra-red frequency transceiver that's part of the -- the system that's being claimed.

It has to have the capability to receive from -- we use the TV example -- to receive an infra-red frequency signal from that TV that's in accordance with the communication protocols. It has to have that ability.

THE COURT: But that doesn't necessarily mean that if the television that is being implemented doesn't have the capability to send a signal back to the base station that the base station doesn't comport with the claims, if it has the ability to receive it, even though the television doesn't have the ability to send it?

MR. LANDIS: Your Honor, I -- I would have to agree with that. I think this claim language is that way, that it has to have the capability of receiving it, not that the -- the external device necessarily has to have the ability to send it. I am not disagreeing with Your Honor.

THE COURT: Okay. All right. What else, Mr. Landis?

11:18:19 MR. LANDIS: That's all I have for this term, Your Honor.

11:18:21 THE COURT: Mr. Keyhani, I'll give you a short period to respond, if you want it. Then we'll move on.

11:18:27 MR. KEYHANI: Thank you, Your Honor.

11:18:28 Our position is basically what -- and we agree with the proposition that the claim language in the invention doesn't speak to the capabilities of the external devices, only to the capability of the communication command control system and sensing system at issue.

11:18:49 As this Court explained in summary judgment in the prior case, the -- on a decision of summary judgment, the limitation only requires that the IR transceiver be capable of sending and receiving IR signals to the plurality of external devices, not that it be capable of transmitting and sending to each device within that plurality.

11:19:08 The Court -- this is interesting. This is relevant to this issue but also relevant to a prior point.

11:19:16 The Court goes on to reference the specification and states that the specification -- this is a quote in the same opinion of this Court on Page 6 through 7 of Document No. 97: The specification supports this conclusion by noting the signals can be transmitted and/or received to any number of appliances or apparatuses of receiving and/or transmitting compatible devices.

11:19:46 And the Court goes on to state that -- in this
11:20:06 context, the Court -- again, without construing the terms
11:20:11 but in referring back to a plurality of the devices or
11:20:16 referencing back to a plurality of devices, the Court
11:20:20 states: The specification supports this conclusion by
11:20:22 knowing the signals can be transmitted and/or received to
11:20:24 any number of appliances and -- and/or apparatuses of --
11:20:30 capable of receiving -- capable of receiving and/or
11:20:32 transmitting compatible signals.
11:20:35 So it confirms the fact that these apparatuses,
11:20:39 which is what we agree with the Court's prior construction,
11:20:42 don't have to have the capability.
11:20:43 If they have the capability, well, then our -- then
11:20:46 this device -- then the invention -- transceiver can
11:20:50 receive the signal.
11:20:52 But also what's interesting is the Court
11:20:54 acknowledges again any number of appliances as a reference
11:20:57 back to each within the plurality of devices.
11:21:00 And I think this is another reference, Your Honor,
11:21:02 where I think -- again, without putting words into the
11:21:07 Court -- saying anything for the Court, but I think it's
11:21:09 consistent with the notion that plurality, again, is a
11:21:12 reference to a number of appliances, as the Court
11:21:15 summarizes the plurality of appliances, again, bringing it
11:21:18 all together and why it was -- is good to address the term

"plurality" at the beginning.

We have no further comments on this -- on this issue.

THE COURT: Thank you.

All right. Let's move on to the next disputed term, "a radio frequency transceiver, in accordance with said communication protocols" from Claim 2 of the '467 patent.

This is structured much the same way where there's a specific proposed construction offered by Defendants, and Plaintiffs have responded with simply plain and ordinary meaning to the extent it's not already covered by the earlier claim construction opinion from the Court.

So in light of that structure, let me ask Defendants to go first, and then I'll hear from Plaintiff in response.

MR. LANDIS: Thank you, Your Honor. Todd Landis again for Defendants/intervenors.

Your Honor, the heart of this issue here is does the radio frequency transceiver that is claimed in Claim 2 need to communicate with the external devices using the same communication protocols that the infra-red frequency transceiver does in Claim 1?

And when we look at the claim language, here, again, both claims are referring to said communication

protocols.

And it's our opinion under the law that by referencing said communication protocols in both claims, it is requiring that both transceivers communicate using the same protocol, same communication protocols.

Now, I anticipate, Your Honor, that we might hear from Plaintiff's counsel that this is nonsensical, that an IR transceiver can't communicate with RF protocols, and an RF transceiver can't communicate with IR protocols.

But the problem there, as I mentioned earlier in this hearing, is that that argument is conflating the transportation mechanism with the protocol.

IR gets transmitted using a carrier signal that's in the IR band. RF uses a carrier signal that's in the RF band. They can both carry the exact same protocols. It's very capable -- both of them are very capable. They're just carrier waves to carry the data.

So the construction and the claim language itself is not inconsistent with a practical or real-world application of this invention, because you have two different carrier signals, IR and IR, that are carrying the same protocols. And we think the plain language of this claim requires that.

Now, when we look at the patent itself -- the patent itself, the whole purpose of the patent is to have

an invention that has both IR and RF capabilities for communicating these protocols because it wanted to have backup systems. If the IR went down, the RF could take over. If the RF went down, the IR could take over.

When you look at Column 1, Line 50 through 61, of the patent, it talks about an object of the present invention being to provide full two-way RF and IR communication links to all apparatus.

The way the invention does that is by having a common communication protocol. That communication protocol, as I pointed out to the Court earlier, is found in Column 7 of the patent at Lines 14 through 19, Your Honor.

That's where the patent talks about the creation of this generalized command and control protocol.

It's those protocols that will be transmitted using either an RF carrier signal or an IR carrier signal. That's what these claims are talking about. And so we believe the proper interpretation here is that both the IR transceiver and the RF transceiver have to communicate using the same communication protocols.

That's all I have, Your Honor, unless there are any questions.

THE COURT: Let me hear from the Plaintiff, please.

MR. KEYHANI: Your Honor, I hate to use the word

that this Court used in its summary judgment, but -- and it is nonsensical.

It is not anticipated that the IR transceiver will communicate -- excuse me, that the -- it is not being disclosed or recited here that the RF transceiver will require the RF transceiver to communicate using IR communication protocols.

That is completely false and nonsensical and doesn't make any sense. No one with reasonable skill in the art would interpret that. I don't think the -- I don't think Defendants' expert in the last case interpreted it that way. I don't think anybody would.

Clearly, the -- the communication with the devices -- with the RF and the IR, you're using separate protocols. And we stand -- we think the Court's construction of that is accurate and is the only -- the only reasonable -- only reasonable construction. And that's all we have to say about that, Your Honor.

THE COURT: All right. Let's move on, then, to "a sound and data coupling device" from Claim 7 of the patent-in-suit.

Let me hear from Plaintiff on this one first.

MR. KEYHANI: Your Honor, this -- this is a simple point. The -- it's -- it's -- Defendants are -- are trying to limit to -- to carve out voice as one of the -- as

data -- as a data signal.

There's no basis to limit the type of sound that's being received. A sound and data device adapted to receive sound as a data signal, there's no reason to -- why the sound cannot be voice.

The patent itself in the specification speaks to voice. I mean, even, for example, if you look at the abstract of the patent, you can go to many places, but just for example, it speaks about -- in the middle of the abstract, the microprocessor also responds to voice signal commands received via the microphone and the voice processor.

It's not only implicit, it is explicit in this patent that the -- that the microprocessor could respond to sound, including voice.

There's no evidence that the Defendants have brought here to show that there's any type of lexicography or any clear and unmistakable surrender of this term to narrow it or to impose any limitations otherwise.

So this is a very basic sort of interpretation and -- out of the claim. There's no reason to -- to remove voice as one of the types of sounds that are covered by the claim. And we see no basis for that.

We have no further argument. This is pretty straightforward, Your Honor.

11:28:59 THE COURT: Let me hear from the Defendants and
11:29:01 intervenors.
11:29:04 MR. WITTENZELLNER: Your Honor, John
11:29:05 Wittenzellner.
11:29:05 I want to at the outset address one of the points
11:29:09 that Mr. Keyhani just made. I'm going to pause. I think
11:29:13 somebody needs to mute so we don't have an echo.
11:29:16 THE COURT: Also, I'm not able to see you,
11:29:26 counsel. If you'll check your connection, please. There
11:29:30 you are.
11:29:31 MR. WITTENZELLNER: Is that better? I apologize,
11:29:32 Your Honor.
11:29:32 THE COURT: Go ahead.
11:29:33 MR. WITTENZELLNER: I wanted to address one of
11:29:35 Mr. Keyhani's points at the outset. We do not contest,
11:29:40 Your Honor, that sound can include voice.
11:29:42 We contest that this specific device claimed in
11:29:46 Claim 7 can receive data -- data signals via voice. And
11:29:54 it's important to look at the claim language for that.
11:29:56 If we go to Claim 6, it introduces a sound
11:30:00 activated device, and we know that it's introducing a new
11:30:04 device because the sound activated device is prefaced by
11:30:10 further comprising, as well as the indefinite article "a."
11:30:13 Now, when we go to Claim 7, which is the actual
11:30:17 term at issue, again, the term is prefaced by further

11:30:22 comprising and the indefinite article. And that term is a
11:30:25 sound and data coupling device adapted to receive sound and
11:30:29 data signals.
11:30:31 Now, that's important. Again, we do not disagree
11:30:35 that voice is identified as a type of sound. But the
11:30:42 specification differentiates between sound as voice and
11:30:46 sound as data signals.
11:30:47 One such example is Column 17,
11:30:50 Lines 41 through 44. There, the specification says:
11:30:56 Similarly sound, including voice, comma, and data signals
11:31:00 are received and transmitted via an infra-red transceiver
11:31:07 that contains detectors and light emitting devices.
11:31:09 So here the specification is differentiating
11:31:12 between voice and data signals. And we have to pay
11:31:17 credence to what the actual term is in Claim 7. It is a
11:31:21 sound and data coupling device that receives sound as data
11:31:26 signals.
11:31:26 Now, the rest of the specification discloses
11:31:30 several voice activated embodiments in which voice commands
11:31:35 are received.
11:31:37 One such example is Column 21, 43 through 46, where it
11:31:42 says: Voice commands are input via a microphone. And then
11:31:47 those voice commands are scanned using a type of pattern
11:31:51 recognition algorithm.
11:31:52 Another such example is Column 24, Lines 37

through 40: In no instance are we aware of any embodiment in which voice is used to communicate data signals.

THE COURT: Thank you. Question? Is the issue whether voice and data signals are necessarily different, in your view?

MR. WITTENZELLNER: I think that's what it boils down to, Your Honor. Looking at the claim limitation, this -- the sound and data coupling device introduced in Claim 7 is different than Claim 6. We know that because Claim 7 should naturally be narrower. It's a dependent claim. And there's two ways to narrow the scope, either further refining something in Claim 6 or introducing a new limitation.

Salazar, in Claim 7, chose to introduce a new limitation that is adapted and focuses on sound as data signals.

And so that in combination with the specification differentiating voice from data signals is the basis for our construction that this device can receive sound as data signals but not voice because voice cannot contain data signals according to the patentee's own disclosure.

THE COURT: Does -- in your view, does Claim 7 encompass a device adapted to receive data signals that can also receive voice?

MR. WITTENZELLNER: No. This is a separate --

I believe it's a separate device from Claim 6. And the reason it can't receive voice -- I mean, if it's exposed to voice, I don't think it would exclude that sound coming into it. It just wouldn't be responsive to that voice and do anything with it because it is made for receiving sound and data signals. It doesn't have the additional capability of doing something with voice to the extent it's supposed to.

THE COURT: All right. Anything further from Plaintiff?

MR. KEYHANI: Yes, Your Honor.

What we have here is Defendants arguing by referring to one or a couple of embodiments -- two or three embodiments or their interpretation of embodiments in the patent to import limitations into the claim that are not there.

Clearly, the device -- the -- the invention contemplates voice as one form of sound and also that -- that the sound as a data signal, which there's no reason why voice cannot be included.

The patentee has a right to claim what he wishes to claim as long as it's supported by the disclosure, and he's not limited by particular embodiments that are in the patent.

That's a basic canon of patent law, and we see no

reason that this -- that sound here should be -- should exclude voice, Your Honor.

THE COURT: All right. Let's move on to the next disputed term, which is "configured to."

Here, the Defendants proposed a particularized arrangement of the memory device for a specific purpose.

The Plaintiffs proposed plain and ordinary meaning.

Let me hear Defendants' argument on their specific proposal first, and then I'll hear a response from Plaintiff.

MR. LANDIS: Yes, Your Honor. Todd Landis again for Defendants/intervenors.

And I think I can maybe short-circuit this a little bit, Your Honor.

I think the only dispute between the parties is the fact that we changed the previous construction of this from "some" to "a."

We'd be fine with this being some particularized arrangement of the memory device for a specific purpose if that works better for the Plaintiff. I -- when I read the briefing, that seemed to be the only dispute.

THE COURT: Well, that's -- that's a good thought, Mr. Landis. But that's the kind of thought that should be communicated to the other side before you get in front of

me and take up all our time and energy.

And if they'd agreed to it, a simple note to the Court saying we worked this term out, you don't need to worry about it would be appreciated.

MR. LANDIS: Yes, Your Honor.

THE COURT: But since that hasn't happened, Mr. Keyhani, does that aussage your concern here, or do you still have concerns?

MR. KEYHANI: I think we're good with that -- with that proposal --

THE COURT: Well --

MR. KEYHANI: -- Your Honor.

THE COURT: All right. I'll make a note of that and review it and see if the Court has any concerns with it. But at least I have -- I have some more focus here.

Okay. The last term for argument, counsel, is effectively what we started with, create, creating, generate, generating, generated, and recreate.

With some trepidation, I'll ask: Is there anything new here that I haven't already heard that you need to present to me?

Plaintiff first.

MR. KEYHANI: I'm sorry.

No, I -- I think the only thing that I would add -- add, and I think this has been said -- stated, that

11:37:10 all of these terms, all of these actions in the context of
11:37:13 the -- of the disclosure of the invention and as the claim
11:37:18 was recited and as Defendants have conceded, and I think
11:37:21 the Court has found before, they all indicate the
11:37:25 capability of the microprocessor to carry out these various
11:37:30 actions, and not that these specific actions that are
11:37:33 actually performed, but it's the capability of the
11:37:37 microprocessor to -- to carry out these functions. And
11:37:39 that's the reasonable interpretation.
11:37:42 And with that, I have no further -- unless I may
11:37:44 have some rebuttal to Defendants' argument.
11:37:49 THE COURT: Mr. Landis, what's Defendants'
11:37:51 position on this?
11:37:52 MR. LANDIS: Your Honor, I really have no more
11:37:55 argument on these terms other than what I addressed the
11:37:59 Court earlier --
11:37:59 THE COURT: Okay.
11:38:00 MR. LANDIS: -- in the -- in the hearing.
11:38:05 Your Honor, I do think that we may have skipped
11:38:06 one term -- I just want to make sure -- "said communication
11:38:10 protocols."
11:38:18 THE COURT: Well, you know, we argued --
11:38:20 MR. KEYHANI: Your Honor?
11:38:22 THE COURT: -- we argued a couple of these
11:38:25 together, and I had that coupled with the second one that

we argued together, but I'm happy to hear -- I'm happy to hear a brief and targeted argument on that if either party thinks it's necessary.

MR. LANDIS: Your Honor, I can be extremely brief on this -- this point.

The -- the only point is this term occurs in the last element, the infra-red frequency transceiver element. We just talked about that, said communication protocols.

The issue here is which communication protocols? The claim has a term "a plurality of reprogrammable communication protocols."

It then in the user interface has "a communication protocol." And in the microprocessor it talks about "each communication protocol." So which ones are we talking about?

And I think Your Honor made the point earlier that claims can run this gambit of being drafted extremely well, being drafted extremely poorly.

And I would submit that, yes, if you have a claim where you had one of these, I can understand why Your Honor would think, well, this isn't so bad.

But how many times today have we argued this same point where you simply can't understand from the drafting what we're getting at? What protocol is it? That's our argument, Your Honor.

THE COURT: That's the basis for your assertion of indefiniteness?

MR. LANDIS: Yes, Your Honor.

THE COURT: All right. Mr. Keyhani, do you have a brief rebuttal?

MR. KEYHANI: Your Honor -- Your Honor is correct that this term was argued before in connection with another term.

But just briefly, there is no evidence being presented -- certainly no clear and convincing evidence being presented that one of ordinary skill in the art wouldn't understand what the term means.

And, clearly, as I argued earlier today, Your Honor, the Plaintiff did, the -- not only reading the language of the claim by one of ordinary skill in the art, but the last claim element of the claim that starts with "an infra-red frequency transceiver coupled to said microprocessor for transmitting to said external devices and receiving from said external devices infra-red frequency signals in accordance with said communication protocols."

The association between -- between the term "said communication protocols" and "communication to external devices" clearly is a reference -- first of all, it's a reference to communication protocols that appears in the

paragraph preceding it because it says said, and also a reference to the first paragraph of the body which speaks to a plurality of reprogrammable communication protocols for communication -- and I'm short handing it -- for communication with said external devices.

There's only one -- there's only one set of communication protocols that are part of this universe of communication protocols. And it's the same communication protocols being spoken -- spoken to.

It's the capability of a microprocessor to create these communication protocols from the universe of existing communication protocols and to communicate with the external devices.

So the last paragraph of this claim circles right back to a reference to the communication with the external devices.

So, clearly, we're talking about one of ordinary skill in the art would clearly understand that the communication protocol discussed in the last paragraph and the second to the last -- second to last paragraph of this claim is also a reference to the reprogrammable -- the plurality of reprogrammable communication protocols in the first paragraph. There are no other communication protocols.

We're talking about the ones that communicate with the external devices, which happens to be the very purpose

of this invention.

Thank you, Your Honor.

THE COURT: All right. Thank you, counsel, for your argument. These issues and claim construction as a whole is under submission. The Court will endeavor to get you written guidance by way of a claim construction opinion as soon as practical.

I remind you of the Court's current practice where after that claim construction opinion issues, you'll have 14 days to meet and confer and determine whether you want to ask the Court to appoint a mediator to mediate your disputes in light of the constructions the Court will issue and whether you have agreed upon a particular mediator or whether you are unable to so agree.

But I will do my best to get you written guidance as soon as I can.

That will complete claim construction before the Court today. Thank you for your attendance and your argument.

The Court stands in recess.

MR. LANDIS: Thank you, Your Honor.

MR. KEYHANI: Thanks, Your Honor.

MR. WITTENZELLNER: Thank you.

(Hearing concluded.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes 8/19/2020
SHELLY HOLMES, CSR, TCRR Date
OFFICIAL REPORTER
State of Texas No.: 7804
Expiration Date: 12/31/2020